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FREEDOM OF EXPRESSION ACT OF 1983

HEARINGS

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

TO PROVIDE THAT THE FEDERAL COMMUNICATIONS COMMISSION SHALL NOT REGULATE THE CONTENT OF CERTAIN COMMUNICATIONS

JANUARY 30, FEBRUARY 1 AND 8, 1984

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FREEDOM OF EXPRESSION ACT OF 1983

MONDAY, JANUARY 30, 1984

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION,
Washington, D.C.

The committee met, pursuant to notice, at 9 a.m. in room SR-253, Russell Senate Office Building, Hon. Bob Packwood (chairman of the committee) presiding.

Staff members assigned to these hearings: Daniel B. Phythyon, staff counsel, and Thomas W. Cohen, minority staff counsel.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. The committee will please come to order.

We are starting today the first of three hearings on the freedom of expression bill. This bill is designed to statutorily extend to the broadcast media and other electronic media the same privileges and protections that now exist for the print media.

When I say the same privileges and protections, obviously it won't be quite the same. There is a constitutional protection for the press and for speech; however under the Supreme Court interpretations to date, these protections do not extend to other forms of expression, especially broadcast expression.

I have had an ongoing interest in this subject for a good 5 to 10 years, but it came to a head 2½ years ago when we had our committee hearings on the restructuring of AT&T. Even at that time I was familiar with the *Miami Herald* case. I don't mean the U.S. Supreme Court decision on it, with which I agree, but the Florida Supreme Court decision. The Florida court concluded that the State's equal space statute was constitutional and that indeed, when the Miami Herald attacked a candidate named Tornillo, he was entitled to equal space. By that I don't mean just an op-ed piece, on a letter to the editor. I mean if it was an editorial against him, he was entitled to a reply in as conspicuous a space, in the same fashion.

In that case, it appears that the plaintiff's attorney made an argument that the Miami Herald was dependent upon electronic communications.

This is a factual situation now over 10 years old. And if a State supreme court could find over 10 years ago that a newspaper was then electronic and therefore subject to obligations like the Federal Communication Commission's content doctrines, most prominently enunciated by the *Red Lion* case of some dozen years ago, if the Florida court could find that 10 years ago, I hesitate to think what the situation would be today, with the rapid advancement of technology.

It is that rapid advancement of technology that was highlighted in the AT&T restructuring hearings. Then, we made a decision in this committee not to break up Bell as the divestiture decree later did—we kept AT&T and the Bell operating companies together and did some other restructuring with Western Electric and Bell Labs. But during those hearings we heard about the explosion that was taking place in communications in terms of the methods and varieties of what we call broadcast communications. Whether it's radio AM or FM or television as we normally know it or cable or satellite or microwave relays or whatever, communications in this country, in the normal sense of the term broadcast, is exploding beyond anything we ever would have imagined even 10 years ago.

So the question became this: There is no question that broadcasting has become pervasive. Is it so powerful, however, much more powerful than the print media, that it has to be subject to special rules regulating content—call it fairness if you want; call it equal time; call it what you want? Is it so powerful and pervasive that it must be subject to special Government rules to protect the public? Or have we reached the place where we have such a diversity of program sources in broadcasting that we can trust that any area has a multiplicity of radio stations; any area now has a multiplicity of television stations; and in the very, very near future, we will have cable or satellite with 10, 20, 30, 40 or more channels.

Is that sufficient protection for the public that we can do away with the content doctrines now administered by the Federal Communication Commission? I think it is. I am perfectly willing to trust to the good sense of the public and the diversity of the sources of information rather than having the Government tell the broadcast media what it can and what it cannot do.

There were only eight daily newspapers in this country when our founders adopted the first amendment. They understood scarcity. And those eight publications were partisan, slashing, passionate publications. There was no balance in those publications. They were pro-Federalist or anti-Federalist, but indeed they were vitriolic. They attacked the incumbent politicians, but the incumbent politicians of that day still said that liberty is so precious and so dear to the preservation of free government as they hoped to establish it, that they would protect the source of communication against any Government regulation, no matter how much they attempted to do them in as politicians, no matter what they said of them.

So it's with that background that we start these hearings. I want to express my appreciation to Senator Goldwater. I asked him if he would mind if we held these hearings at full committee rather than subcommittee level and he very graciously agreed. I think the subject is so important that I'm hoping before we're done, more than just Senator Goldwater and myself will show up for these hearings, and that when we go to markup, as I hope we will do, as many of the committee members as possible will have had the benefit of the hearings.

Barry?

OPENING STATEMENT BY SENATOR GOLDWATER

Senator **Goldwater**. Well, I really don't have much to add to what you have said. I think that in the minds of American people, I know certainly in the minds of this particular citizen, there has been a growing apprehension that the real purposes of the first amendment have been rather overlooked, and somewhat abused. As a result, we are seeing a very drastic decline in the quality of our newspapers, magazines, the printed media. And when I say quality, I mean the ability to come away from reading the paper with comprehension of what the news might be.

I have watched very prominent newspapers become only harbingers of what you should wear for breakfast and lunch and what your manners should be and so forth and so on.

Now my concern with the nonprinted media, the electronic media, has been to a great extent, an apparent total irresponsibility toward accuracy and honesty. I don't know how we can regulate this, Mr. Chairman. If the television and radio end of our system doesn't know enough or doesn't understand honesty, I don't know how we can control that.

I doubt that we are any better judges of honesty than the average operator of a television or radio station. But I think this series of hearings can serve a good purpose, even if we don't come up with any direct deregulation of Federal control, by pointing out to our friends in the media business that if they don't straighten up their own house, the American people will straighten it up by their usual manner—they will quit buying them.

I am not going to get into any elaboration of what I specifically feel are examples of the poor handling of their powers, but if it's needed, I will do it. So I look forward to these hearings and the chance to hear what the operators, the printers, the publishers, and so forth, honestly feel we can do.

I thank you.

The **Chairman**. Barry, thank you.

We will take the witnesses today in the order appearing on the witness list. The reason I started these hearings early is so that each of the individual witnesses could have 10 minutes, which is longer than our normal time period. We will have to restrict the witnesses on panels to the usual 5 minutes. But the subject is so important that I wanted to make sure no one was cut off.

Obviously, everyone who wanted to testify in favor of this bill could not be accommodated. I have tried to accommodate everyone who wanted to testify against it. It turns out there are many, many more people, at least in terms of those who have approached us, who want to testify for it than against it. But for those who are opposed, I want to make sure they are heard and that they cannot say that they never got a chance to appear and present their views before this committee.

[The bill follows:]

II

98TH CONGRESS
1ST SESSION

S. 1917

To provide that the Federal Communications Commission shall not regulate the content of certain communications.

IN THE SENATE OF THE UNITED STATES

OCTOBER 3, 1983

Mr. PACKWOOD introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To provide that the Federal Communications Commission shall not regulate the content of certain communications.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Freedom of Expression Act of 1983".

FINDINGS

SEC. 2. The Congress finds that—

(1) free and unregulated communications media are essential to our democratic society;

(2) there no longer is a scarcity of outlets for electronic communications;

(3) the electronic media should be accorded the same treatment as the printed press;

(4) regulation of the content of information transmitted by the electronic media infringes upon the First Amendment rights of those media;

(5) regulation of the content of information transmitted by the electronic media chills the editorial discretion of those media and causes self-censorship, thereby dampening the vigor and limiting the variety of public debate; and

(6) eliminating regulation of the content of information transmitted by the electronic media will provide the most effective protection for the right of the public to receive suitable access to a variety of ideas and experiences.

PURPOSES

SEC. 3. The purpose of this Act is to extend to the electronic media the full protection of the First Amendment guarantees of free speech and free press.

AMENDMENTS TO THE COMMUNICATIONS ACT OF 1934

SEC. 4. The Communications Act of 1934 is amended—

(1) in section 312(a) by—

(A) adding "or" immediately at the end of paragraph (5);

(B) striking out the semicolon and "or" in paragraph (6) and inserting in lieu thereof a period; and

(C) striking out paragraph (7);

(2) by repealing section 315;

(3) by amending section 326 to read as follows:

"Sec. 326. Nothing in this Act shall be construed to give the Commission the power to—

"(1) censor any communication;

"(2) review the content of any completed communication; or

"(3) promulgate any regulation or fix any condition which shall interfere with the right of free speech, including any requirement of an opportunity to be afforded for the presentation of any view on an issue.".

○

The CHAIRMAN. We will start off this morning with a panel of Dr. Craig Smith, who is the president of the Freedom of Expression Foundation, and John Armor, a lawyer who is well versed in cases involving the first amendment.

Good morning, gentlemen.

STATEMENTS OF DR. CRAIG R. SMITH, PRESIDENT, FREEDOM OF EXPRESSION FOUNDATION, WASHINGTON, D.C.; AND JOHN C. ARMOR, COUNSEL, WASHINGTON, D.C.

Mr. SMITH. Senator, I've entered a statement in the record and would like to just summarize it briefly and then introduce John Armor.

As you have pointed out, and as historians have noted, when the first amendment was passed in 1791, there were only 8 daily newspapers operating in the newly formed United States, and if I can do a little historical revisionism, by our count only about 26 weekly papers at that time, literally a handful.

Each one of those newspapers was highly partisan, and yet our Founding Fathers said that Congress shall make no law abridging freedom of the press.

A close reading of the notes of our Founders, their letters and their speeches, makes clear that they would have extended protection to the electronic media had it existed at that time.

The CHAIRMAN. Would you say that again? I think that's an important point.

Mr. SMITH. I think that given the historical research that we have done at the foundation, a close reading of the notes and the letters and the speeches—we will be entering a report into the record—of the Founders indicates that they would have extended protection to the electronic media had it existed at that time.

The CHAIRMAN. Translated, are you simply saying they could not imagine anything beyond speech and print?

Mr. SMITH. Yes.

The CHAIRMAN. Which they intended to fully protect. Marconi was simply beyond their imagination.

Mr. SMITH. That's right. And it is clear that they meant to protect all forms of communication. As you pointed out, when you look at what was printed in those early papers, there is entertainment, there are salacious attacks, and those things were left to the courts to take care of in terms of libel and slander. But in terms of regulating free speech, they wouldn't have imposed it, at least according to our reading of the Founders.

Since they did not, and could not imagine Marconi and others, the Congress, through the Communications Act of 1934 and subsequent amendments, was able to impose controls over news and editorial content of broadcast programs, including regulation over the content of paid commercials and political debates.

The time has come, in our opinion, to return to the vision of Jefferson's free marketplace of ideas. First, in *Red Lion* v. *FCC*, the Supreme Court ruled that the Government could regulate the content of broadcasting because of the scarcity of publicly owned airwaves. But with the advent of cable and the fact that there are over 1,200 television stations, not counting low power, and 9,000 radio stations in America, scarcity can no longer justify regulation over these sources of citizen information.

Second, the case for the Government treating electronic journalists as second-class citizens can no longer be maintained. Using the rules imposed by the Federal Communications Commission to keep television personalities in line is nothing less than censorship. If a television reporter ignores a legal bounds by maliciously disregarding the facts, he or she can be taken to court the same way a newspaper reporter can be. General Westmoreland is the most recent public figure to take advantage of these legal safeguards.

Third, the cost of reporting requirements under the regulations is an unfair burden, a burden that no member of the print media bears. According to the National Association of Broadcaster's survey of some 40 comparative renewal proceedings, the average case lasted 8 years. It is not uncommon for radio stations to spend an average of $600,000 and television stations $1.2 million on legal fees.

Worse yet, print companies which own broadcast properties can be intimidated. Although the first amendment, which the Senator pointed out and made clear, shields the print media from direct threat, those companies which own radio and television stations are targets for intimidation by single issue groups or even the Government itself. There have been administrations that have used that device as a way of threatening newspapers.

In such an environment, it would not be difficult to challenge the broadcast licenses held by newspapers if those newspapers did not alter their coverage to reflect a certain viewpoint. We consider that situation to be highly dangerous.

But the damage done to the electronic media and the print media pales in comparison with the harm that is inflicted upon the democratic system. All of the press must be free from Government instrusion if it is to provide the informing and to perform the watchdog functions vital to our democratic system.

While Government regulations are intended to increase the diversity of information outlets, they have had the opposite effect. Regulation has encouraged the media to be bland and inoffensive to avoid offending the Government or triggering right of reply. As a result, many members of the electronic media are a less effective part of our national society, and public exposure to many issues and viewpoints is severely curtailed.

Finally, if Government regulations are extended beyond their present reach, there will be even less diversity, innovation and choice for the public. Less expensive and better cable services will not be available because investors will not risk capital in a regulated market. Banking, computer, and shopping services will not be upgraded because investors do not want to tilt with Government intrusion.

If freedom of expression is won for the electronic media, money which has been diverted to fulfilling regulatory obligations can be channeled into more productive areas, areas where competition would insure more programing improvements for children, for the culturally minded and for minorities. Everybody would benefit—broadcasters, cablecasters, teleshoppers, the print media, and most of all in my opinion, the consumer.

That is why the Freedom of Expression Foundation was formed and why we are working to repeal sections of the Communications Act which restrict news and editorial content. Legislation to do just that has been introduced in the U.S. Congress, and we believe now is the time to pass it.

Thomas Jefferson's dream for a democratic republic was premised on an educated voting public that could partake of the free marketplace of ideas. Jefferson's dream can only become a reality in a society where freedom of expression is guaranteed by all communicators. That is why we must reestablish a first amendment environment as soon as possible.

[The statement follows:]

STATEMENT OF CRAIG R. SMITH, PRESIDENT, FREEDOM OF EXPRESSION FOUNDATION

WHY CONTENT REGULATION IS DANGEROUS

When the First Amendment was passed in 1791, there were only 8 daily newspapers operating in the newly formed United States. Each one of those newspapers was highly partisan, and yet our Founding Fathers said that "Congress shall make no law abridging freedom of the press." A close reading of their notes, letters and speeches makes clear that they would have extended protection to the electronic media had they been farsighted enough.[1] But since they did not, the Congress, through the Communications Act of 1934, was able to impose controls over news and editorial content today despite the fact that there are over 1,200 television stations and 9,000 radio stations in America.

The time has come to return to the vision of the Founding Fathers and particularly Thomas Jefferson's dream of a free market-place of ideas. The time has come to extend to the electronic media the same rights that are guaranteed for the print media. The time has come to protect developing technologies from government control. Let me spend some time developing the case for my position.

Damage results from government regulation of the communications industry. First and foremost, the rights of the electronic media are severely impaired. They do not enjoy essential First Amendment protections, nor are they given full journalistic freedom. Historically, the Congress, the courts, and the Federal Communications Commissions have restricted the First Amendment rights of the electronic media by using the Communications Act of 1934 as a statutory basis for controls. Purportedly, the electronic media have distinctive characteristics which afford them lesser First Amendment rights than those enjoyed by the print media.

According to the Act and the Court's interpretation of it, scarcity of the publicly-owned airwaves justifies government regulation. In *Red Lion Broadcasting Co.* v. *FCC*, the Supreme Court ruled that the government could regulate the content of broadcasting because the publicly owned airwaves were limited in number.

Ironically, pervasiveness and accessibility of the media have also been used as a rationale to control content. In *FCC* v. *Pacifica Foundation*, the Supreme Court ruled that the government could regulate the content of broadcasting because it was a "pervasive presence" in American society. That something can be both scarce and pervasive seems a contradiction. But that didn't bother the Supreme Court. As a result, the electronic media have lost invaluable and essential elements of their freedom. Worse, broadcast journalists must justify their performance to the government, a concept which is totally alien to our First Amendment traditions.

And yet, neither scarcity nor undue influence through pervasiveness are a sane rationale for regulation. One UHF channel can be broken into 100 quality radio stations according to Professor Ithiel de Sola Pool of M.I.T. Cable brings scores of channels even to rural areas. In fact, so many stations exist in Philadelphia that Channel 48 TV was turned in for relicensing. Furthermore, newspapers are often more influential than television stations. The Post is more influential than any TV station in Washington, D.C. The same is true of the Times in New York City, the Tribune in Chicago and the Globe in Boston, to name but a few.

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[1] See forthcoming study, *Substance and Shadow: The Original Meaning of Freedom of the Press*, written by John Armor for the Freedom of Expression Foundation. See also C. Edward Wilson, *Teeming Invective: 300 Years of Vigorous Journalisms*, (University of Western Ontario, London, Canada, 1976); George Henry Payne, *History of Journalism in the U.S.* (D. Appleton and Company, New York, 1920), pp. 114–117.

But second class citizenship is not the only burden that broadcasters have to bear. The electronic media are penalized financially as a result of government regulation. The cost of FCC reporting requirements is enormous; it's a cost that no member of the print media bears.

According to an NAB survey of some 40 comparative-renewal proceedings, the average case lasted eight years. The same study shows that radio stations spend an average of $600,000, and television stations $1.2 million, on legal fees in such cases. When a viewer complains that a station's coverage has been unbalanced or unfair, the station is often forced to call in its lawyers. If a station must defend its actions before the FCC or the courts, the legal expenses and management costs can be enormous. In the 3 years from 1973 to 1976, there were 13,800 complaints filed with the FCC.[2] Even after an FCC hearing, either side can resort to the courts causing higher expenditures and years of uncertainty. A single complaint cost even a small radio station $20,000 and 480 personnel hours in research and paperwork. Broadcasters must submit reports and logs, and must conduct community ascertainments to comply with FCC requirements. The FCC itself estimates that stations expend a total of over 8 million person hours per year on these requirements. Commercial television stations, for example, average over 12,000 person hours on ascertainment obligations alone.[3]

But the costs don't stop there. Stations must bear the cost of providing "public affairs" programming, and must subsidize opposing viewpoints. Stations have to provide free time in certain instances, and must provide time for political commercials at reduced rates.

There is also the cost of foregone business opportunities to be considered. FCC rules and program guidelines can prevent a station from providing programs or services which may be highly popular and therefore profitable.

Examine the case of Simon Geller, a daylight radio broadcaster in Gloucester, Massachusetts. Geller played only classical music—no all talk, no news, no accuweather—just classical music. The FCC took his license away despite the fact that there were 40 other stations available to Geller's listeners, including an all-news station from Boston. Clearly, stations are not permitted to "find their niche" in the marketplace. They are forced to become "public interest" clones, created by the coercive FCC rules which are part of statutory law.

These controls affect the print media as well as the broadcast media. Government regulation of the electronic media weakens the concept of an independent print media. In sharp contrast to the status of the electronic media, the print media are insulated from government intrusion into editorial affairs (See *Miami Herald Publishing Company* v. *Tornillo*). But print companies which own broadcast properties can still be intimidated. Although the First Amendment helps shield the print media from direct threats, those companies which own broadcast licenses are targets for intimidation by the government or other parties. Licenses can be challenged if the newspaper's coverage is not altered to suit a particular viewpoint.

That's why government regulation of the electronic media weakens the concept of an independent printed press. The First Amendment is viewed by some groups as an anachronism, and government oversight is thought to "improve" media performance. They argue for enforced accuracy in the evening news and for quantification of programming, thinking they know what is best for the public over the public airwaves. Even print protections may be lost in an atmosphere where government control is encouraged.

But the damage done to the media pales when compared to the harm that is inflicted on the democratic system. All of the press must be free from government intrusion if it is to provide the informing and perform the "watchdog" functions vital to our democratic system. All of our basic liberties depend for their survival on freedom of speech and press.

While goverment regulations are intended to increase the diversity of information outlets, they have had the opposite effect. Regulation has ensured that the media will be bland and inoffensive, to avoid offending the government or triggering "rights of reply". Innovation and experimentation are kept to a minimum. Even the right of corporations to discuss issues in their own paid commercials—a right 85 percent of the public favors according to a recent Opinion Research Corporation study—is severely restricted by the application of the current rules.[4] As a result, the electronic media are a less effective part of our national society, and the public is not exposed to as many issues and viewpoints.

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[2] David Kelley and Roger Donway, "Laissez Parler: Freedom in the Electronic Media," (Bowling Green State University, 1983), p. 31.

[3] See Steven Simmons, "The Fairness Doctrine and the Media," (Berkeley: University of California Press, 1978), pp. 80-90, 208-220.

Clearly, current regulations are unfair to broadcasters, threatening to the print, restrictive to corporate free speech, and damaging to the public.

And that's not the end of it. If regulation is not eliminated, additional harm will occur in the future. First, the electronic media will be stifled because new technologies will be regulated. Although government regulation originally was designed for radio broadcasting, it has expanded to cover new technologies. Television is regulated. Cable television is regulated as well, although it is delivered through wires, not over the air. In fact, the government has regulated every new communications technology to be developed in the last 50 years.

A recent ruling in the Rhode Island Federal District Court says cable is different from print and therefore can be regulated! "Must carry" and public access rules force cable companies to reject other channels that their customers would prefer. They are forced to carry UHF channels and low power broadcasts instread of HBO and ESPN. The viewers should have a right to watch the channels they prefer. Government determination of what should be the viewers' choice is patronizing at best and Orwellian at worst.

Furthermore, direct broadcast satellite services will be regulated when they become available. Therefore, it is very likely that any future "broadcasting" technologies will be regulated as long as the FCC has the statutory base from which to act.

Second, the print media will be stifled because "electronic" newpapers may find themselves regulated in the future. Teletext and videotex are two new services which have the potential to be the "newspapers" of tomorrow. These services transmit textual information over wires or broadcast signals into homes and offices, where the information can be read off a videoscreen. Newspapers which get involved with these services may be subjected to government regulations, merely because they utilize electronic delivery methods. In that event, these newspapers will suffer the same damage now suffered by the broadcasting media.

Third, if government regulations are extended beyond their present reach, there will be even less diversity, innovation, and choice for the public. Inexpensive and improved cable services will not be available because investors won't risk capital in a regulated market. Banking, computer, and shopping services will not be upgraded because investors do not want to deal with government intrusion.

The present legal framework cannot resolve the problem of government regulation. Administrative reform through the FCC is inadequate. The FCC's ability to deregulate is limited by the Communications Act of 1934 and subsequent amendments.[5] They can only, as Commissioner Dawson has made clear, go back to the basic statutes. The FCC must follow the will of Congress as expressed in those statutes. Therefore, the FCC, even in a strict interpretation of statutes, by itself cannot remove government regulations required by the Communications Act of 1934, though the current commission has made heroic strides in that direction under the leadership of its Chairman, Mark Fowler. Such regulations include the so-called "Fairness Doctrine," the reasonable access provisions, and the equal opportunities requirements.

But even the current FCC reforms are impermanent. Although the present Commission is attempting to "unregulate" the electronic media, these actions can be reversed by future commissions. A majority vote of the commissioners is all that is required to reimpose regulations or to impose more onerous regulations. And even if the FCC eliminates regulations, that action is the sufferance of the Congress and the courts.

That is why we support repeal of Section 315 of the Federal Communications Act, and attendant rulings. We want to extend First Amendment rights to broadcasters. We want to create a First Amendment environment not only for the print media, but for all communicators.

If freedom of expression is won for the electronic media, funds which have been diverted to fulfilling regulatory obligations or defending station activities can be channeled into more productive areas. Everybody would benefit—broadcasters, cablecasters, the print media, videotex operators, and most of all, the consumer. Perhaps that's why at the Freedom of Expression Foundation we've been able to put together the broadest-based coalition in the history of deregulation. The networks and the motion picture industry are represented on our boards. AT&T and GTE have given us contributions. Labor unions and oil companies have joined our coalition. The Society of Professional Journalists, the Association for Education in Journalism and Mass Communication, the Radio & Television News Directors Association, and the American Newspaper Publishers Association have all endorsed the call for a repeal of these heinous content doctrines.

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[4] Opinion Research Corporation, Advocacy in Advertising by Corporations, (Princeton, September, 1980), p. 10.

[5] It is interesting to note that Senator Proxmire, who in 1959 incorporated the so-called "Fairness Doctrine" into the Act, has since changed his mind and introduced legislation to repeal it.

Thomas Jefferson's dream for a democratic republic was premised on an educated voting public that could partake of the free marketplace of ideas. Jefferson's dream can only become a reality in a society where freedom of expression is guaranteed. That is what the Freedom of Expression Foundation is dedicated to. And I hope this Committee, the Senate and eventually the entire Congress will join us in this very important battle for freedom.

Mr. SMITH. The Freedom of Expression Foundation sponsors research, and one of our early projects was an examination of the record as to the intent of the Founding Fathers when the first amendment was adopted. We asked John Armor, who I would like to introduce at this point, to do that report for us. John graduated from Yale in 1964 with two majors—in English and political science. He was editor of the Yale Daily News. He received his J.D. in 1970 from the University of Maryland Law School. He has argued 10 cases before the Supreme Court, of which 9 were on the first amendment; published many articles, and is currently practicing the law and is also a senior fellow of the National Center for Constitutional Studies.

The CHAIRMAN. I might say, Mr. Armor, I have read the article you wrote on what our founders intended. It is the best single article on that subject that I have run across, and I have read quite a few. Go right ahead.

Mr. ARMOR. Thank you, Mr. Chairman, for those kind remarks. Let me correct one point. I have not argued nine cases at the Supreme Court. I have had them. I have not been the privileged person to speak.

Let me begin with something that goes to your comments, Mr. Chairman, and your comments, Senator Goldwater, and I hope will be of interest to the other members of the committee when they read the record.

Let me give three samples of the press that was intended to be free under the first amendment. The first is from the Aurora General Advertiser in December 1796. And these, by the way, are in my final report:

> If ever there was a devoted tool to a faction, the editor of the New York Minerva may safety be said to be one. If ever a man prostituted the little sense that he had to serve the purposes of a monarchic and aristocrastic junta, Noah Webster, Esq. must be the man.

Now as we all know from our history, Noah Webster is one of the great figures in our early history, and yet this sort of comment was made by an anti-Federalist paper about him because they felt that the Federalists were not sufficiently democratic.

Now let us turn to the other side and we find this quote in the Brunswick Gazette, which was a Federalist paper, of November 2, 1787:

> To the anti-Federal junta in Philadelphia, with great regard and sincere wishes for your success in everything that tends to anarchy, distress, poverty, and tyranny, I am your friend and humble servant, Daniel Shays of the Franklin State.

Now Daniel Shays does not mean much to many of us today, but if we go historically, he led a very serious revolt against the government, and to associate the names of your enemies with Daniel Shay's then is the same as associating them with James Jones of Jonestown today. It was that serious an attack.

Now, Mr. Chairman, just one other sample and then we'll go into the discussion. Also from the Aurora General Advertiser:

> If ever a nation was debauched by a man, the American Nation has been debauched by Washington * * *. Let his conduct then be an example to future ages. Let it serve to be a warning that no man may be an idol and that a people may confide in themselves rather than in an individual.

And that, of course, is of George Washington, the Father of our Country.

That is the kind of press that was intended to be free, but intended to be free how and why? There is a curious thing about freedom of the press. It is the one part of our governmental structure which was not designed in theory, put in place and which we then grew into in our national experience. It was the exact opposite.

It was not in our Federal Constitution to begin with, and when it was put in in the Bill of Rights, we had only a limited idea of what it would mean. On the other hand, starting during the American Revolution, we had in fact freedom of the press because the battlelines were not clearly drawn and changed. There was no problem with anyone who wanted to run a newspaper, either as a Royalist or a patriotic newspaper, doing so. And interestingly enough, they circulated side by side.

In northern New Jersey, for instance, the British then held New York and Washington was in southern New Jersey. Both types of papers could be read by the same person if that person was literate. And remember, we had about one-third literacy then. But the Royalist and the rebel newspapers could be read in the same household, or in adjacent homes. And that is real freedom of the press.

It doesn't exist because the government intended it. The colonial government subsidized and sought to control the press of the day and so did Generals Gage and Howe for the British. They also paid subsidies to publishers and sought to control their papers.

So we didn't have a theoretical freedom of the press. We had one that existed in fact.

Now why is this important, although it happened almost 200 years ago? It is this: the press, as an institution, was given freedom first in the State constitutions of Massachusetts and Virginia, later in our constitution, because it served a function, a function of communication. The press or the Fourth Estate, which we adopted from the French tradition, is quasi-governmental in that it is necessary to a government. Jefferson said, "If I must choose between government without newspapers or newspapers without government, I would choose the latter."

What he was saying was communication between the American people—not just on political subjects, but on all subjects—was essential to our national life and was essential to our government, and that the press as an institution had to be protected. And that was the function of freedom of the press originally. That is still the function of freedom of the press.

And the question today is whether we have lost part, maybe a large part, of the institutional function of those words—freedom of the press—by assuming that press means only that which is printed with ink on paper, as opposed to the business of communication.

This being the Commerce Committee, let me use an example. If a railroad says to itself, we're in the business of running railroads, they're in big trouble. But if they say to themselves, we're in the business of transportation, of getting people and goods from place to place, and get into trucks and get into ships and get into airplanes and get into land and so forth, they have a better chance of survival.

That is the point with any institution. You need to go back to the origins in order to say what purpose are we filling? And given the changes in society and given the changes in technology, is our purpose different in how it is carried out? And if the answer to that is yes, then we have to concern ourselves, as the chairman said, with the increasing disappearance of the line between the press in print and the broadcast media, because when it disappears entirely, we are going to have a severe constitutional crisis on our hands, based on the first amendment and based on the natural tendency of every government in the history of mankind to control communications.

They all seek it. It makes no difference whether they are liberal or conservative, whether they are democratic or monarchic. It is the natural tendency of a government to want only good news to get out; going back to the Greeks, we tend to kill the messenger who bears bad news.

Since that is a natural tendency, speaking as a political scientist, there must be, if there is going to be a free press, a very effective barrier. And the first amendment, freedom of the press, today is no barrier at all with respect to the broadcast media.

I invite any questions that you might have.

[The statement follows:]

STATEMENT OF JOHN C. ARMOR

As of 1791 the only form of general communications to the public concerning governmental matters and governmental officials were the newspapers and magazines. To the Framers, the word "press" included every form of communications or document which could be produced on a printing press. Their intention at the time was therefore freedom of communication, but since the only form of communication was via printed matter, that is all that they needed to say.

A second point that supports that inference is the importance that the Framers placed on the establishment of the United States Postal Service. Under the Articles of Confederation the federal government was not involved in establishing any uniform federal method of delivering the mails. There was a postal service, whose results were spotty at best, since the Post Masters were all private individuals appointed by state of local governments. The reasons for establishing a national postal service as provided in Article I, § 8 was clear, and on this point there was no dissent. As stated in both the proceedings of the Constitutional Convention, and in the Federalist Papers, the Federal Post Office was designed to guarantee ready communication between citizen and citizen, and also to carry the newspapers and magazines which were the public forms of communication.[1]

The need of this service was underscored by such times as the appeal from the Boston newspapers published in the Brunswick Gazette in New Jersey on 11 March, 1778. The Boston papers complained that for a matter of 2 months they had not received copies of any other papers and complained about the inadequate service from the then existing post offices.

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[1] See the *Federalist*, No. —.

A review of the newspapers of the day shows that about half of every issue of every newspaper was taken up with statements republished from other newspapers in other states and also statements republished from private letters between citizens of different jurisdictions on matters of public concern. In short, the use of the Post Office to circulate both newspapers and letters and the republication of information from other states and cities was the functional equivalent of the Associated Press and the United Press International today.

The intention of the Framers concerning the Post Office was quite clear. Its mission was to deliver to the addressees whatever letters or publications were presented for delivery. Its mission did not include any form of selected delivery based on the content of any newspapers or letters, nor did it include any provisions for opening, reading, and considering the contents of such mail.

Since the Post Office was intended as an open and free channel of communications for all written matters which might be offered to it, it is a logical conclusion that equal freedom was intended for all forms of communication which might be produced and deposited for delivery.

There is an unrelated part of the Constitution, and area of Constitutional law, which suggests by analogy that the word "press" in the First Amendment ought to include all forms of public communication, whether printed or electronic. The third power given to Congress under Article I, § 8 is the interstate commerce clause. At the time it was written, the only forms of interstate commerce which existed were by sailing vessels and horse-drawn wagons.

When Robert Fulton invented his steamboat, however, he asked for and obtained an exclusive franchise from New York to operate between that state and New Jersey.[2] The question was then put to the Supreme Court whether New York had any power to regulate the steamboat, since the interstate commerce clause gave power generally over that subject to the Congress. The Court had no difficulty whatever in concluding that the interstate commerce clause prevented such regulations by the State of New York. It concluded that the intention of the Constitution was to give such authority over all forms of interstate commerce to the Congress, and it made no difference whatsoever that the steamboat as a means of carrying out such commerce was unknown at the time the Constitution was adopted. On the same basis, there was no problem in the view of the Supreme Court in applying the same clause to allow regulation by Congress of all other late-developed forms of such commerce, including railroads, airlines, telegraphs, telephones, and so forth.

Some decisions of the Supreme Court on other subjects have generated dissent on the Court and serious debate by thoughtful commentators as to whether the Court is doing violence to the original intention of the Constitution by basing its decisions on later developments in technology and social developments. There has never been any such serious debate concerning the interstate commerce clause. And if the same logic is applied to the word "press" in the First Amendment, a similar result could be reached.

The Framers recognized that there is a natural antagonism between the press and the government. It is a natural tendency of any government at any time to seek to shape the news in order to minimize or eliminate references to its faults and to present its virtues in the best possible light. It was also a natural tendency of the press 200 years ago, and is of the media today, to seek to present the fullest possible reports of what the government and its officials are doing, regardless of how those reports reflect on those officials and regardless of whether they may produce favorable or unfavorable reactions among the people.

Because the current meaning of freedom of the press developed much more from what happened in our history, rather than from abstract theories of what it ought to be, it is worthwhile for us to review some of the events which have created our definition. There is no analogy in the 20th century, and therefore none in the electronic media, to the raid by a band of armed men who closed Rivington's New York Gazette. The closest thing to it were the occasional duels and horsewhippings that took place between hot-blooded and opposing editors in the Midwest before the Civil War, primarily between those who supported slaverly, and those who supported abolition.[3]

In fact, some argue that the modern media are bloodless shadows of their forebears. While the detailed information carried today is far more extensive and much more prompt than that in the newspapers of 200 years ago, the modern media may take themselves too seriously in working toward impartiality. What has been in part lost is the passion, the commitment to causes, the calls to action, even in many respects the beauty of the language, that were common in the early newspapers. And what the public has lost is the opportunity to compare, one against the other, sources of information that clearly and unashamedly take diametrically opposing views on the major issues of the day.

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[2] *Gibbons* v. *Ogden* (1824) —— U.S. ——.

[3] *American Press Opinion*, ——.

On the other hand, the "good old days" were also marked by yellow journalism which so badly distorted information that readers were at best confused, and at worst coerced into bigotry. America's entry into the Spanish-American War in 1898, despite pleas for conciliation by Spain, is an example of just how powerful and misguided the press could become. At the same time, the modern media's record with regard to McCarthyism, Vietnam, and Watergate should be praised for courage and persistence.

It is worthwhile to read and consider the excerpts from the early American newspapers, which are quoted in the margins of this study. Sources are given at the end for those who want to delve into the reality of the first free press that ever existed in the history of the world.

Some might argue that it was excessive for the various early American newspapers either to praise Washington as the greatest of living men, or to attack him as a buffoon, a tryant or world-be king. But perhaps the opposite it true. Perhaps the modern tendency to bury the various prejudices of reporters and editors alike in the unrealized and unrealizable pretense of totally impartial reporting weakens public debate. Where there is passion and commitment, there are always excesses in the conclusions reached. But perhaps journalism without passion represents more loss than gain. Perhaps journalism without commitments, clearly made and forcefully stated, is a lesser use of freedom of the press than were the slashing attacks and staunch defenses of the press during the Revolutionary War.

We are forced today, in the 1980's, to reconsider the meaning of freedom of the press in our society. In part, that reconsideration is compelled by technological developments. At present the print media are totally free and unregulated, but the electronic media are subject to content control and regulations. Technology is quickly blurring and will shortly destroy the boundary line between those two means of communication.

Already many aspects of many newspapers involve electronic communications. Many national publications are transmitted to regional printing plants via satellites, 22,300 miles in space. Experiments have already begun with electronic newspapers, transmission via teletext to the home television sets.

The blurring of the boundary between the print publishers and the electronic "publishers" inexorably raises the question of whether the content regulation of the broadcast media will encroach on the presently-unregulated newspapers and magazines, or whether instead the freedom of the print media will be extended to the broadcast media.

Related topics which will arise in the debate on whether freedom of the press will either expand or contract are the libel and obscenity laws. The laws on these subjects are primarily state statutes. By interpretation of the Supreme Court, the First Amendment does not protect libelous or obscene matter. So the current fate of the First Amendment will have no direct impact on these laws. If the regulation of broadcasting expands to include electronically-published newspapers and magazines, then the Federal Communications Commission will be able to regulate non-obscene, non-libelous newspaper and magazine articles. If the result is the reverse, and press freedom is extended to electronic "publishers," then they will still be subject to all of the state libel and obscenity laws, as they are today. Either way, there will be neither an increase nor a decrease in the liability of any media for producing or publishing matter that is found libelous or obscene. In short, although both of these topics may be dragged into the current debate on freedom of the press, both are non-issues. Neither would be affected; neither is relevant.

At this juncture, it is impossible for the First Amendment to remain stationary. It is being forced in two directions—expansion and contraction—at the same time. Only one of those will ultimately prevail. If we do nothing but let nature take its course, the more likely result is a loss of freedom and an expansion of regulation.

The basic question of direction pushes us, as citizens, as legislators, as judges, towards a reconsideration and a redefinition of one of the most important and most sensitive rights in our Constitution, the freedom of the press.

"Could anything but objections to the Constitution of the most serious kind have justified the hazarding an eventual schism in the Union, in so great degree as would have attended an adherence to the advice given by Mr. Jefferson? Can there be any perversion of truth in affirming that the person who entertained those objections was opposed to the Constitution?

The opposition which was experienced in every part of the United States, acknowledged the necessity and utility of the Union; and, generally speaking, that the Constitution contained many valuable features; contending only that it wanted some essential alterations to render it upon the whole a safe and good government."

"Gazette of the United States, 19 September, 1792, Alexander Hamilton, writing under the name, "Catallus," and attacking his arch-rival Jefferson for the ratification process of the Constitution and Bill of Rights.[4]

"If ever a nation was debauched by a man, the American nation has been debauched by Washington. . . . Let his conduct then be an example to future ages. Let it serve to be a warning that no man may be an idol and that a people may confide in themselves rather than in an individual.—Let the history of the federal government instruct mankind, that the masque of patriotism may be worn to conceal the foulest designs against the liberties of the people." *Aurora General Advertiser, 23 December, 1796.*[5]

The CHAIRMAN. I am indebted to you for calling to my attention a fair number of those papers that circulated from roughly 1775 up through the time of the Constitution. Indeed, they are some of the most salacious, biting, passionate writings I have run across. I can understand why any politician of the time would have been stung almost to the extent of wanting to lynch the publisher. And yet you are saying in spite of that, our Founders very clearly said that is to be protected?

Mr. ARMOR. Well, there was an ambiguity, Mr. Chairman. As you know, shortly after the first amendment was passed, in 1789, the Congress of the United States passed the alien and sedition laws, which made it illegal to impune the Government or the officials of the Government of the United States. This was passed by the Federalist and remained in effect until 1801, and under it, a number of publishers were sent to jail. American printers and publishers did in fact go to prison after the first amendment was passed. And the Supreme Court in this century has said there is no question that those laws were unconstitutional.

Now they weren't tested at the time, which goes in part into our history. It is fortunate they were not because the Supreme Court at that time was a weak institution. It had not established itself. And if the Supreme Court in that case had tried to strike down a law of Congress, it might have resulted in a failure of judicial review, which today of course is essential.

That is why I say, Mr. Chairman, that it was ambiguous. The press themselves understood. They ran freedom of the press, the Massachusetts Bill of Rights, on their masthead. And the more enlightened politicians, like Jefferson, understood that even a press which attacked him for being a miscegenist and an atheist and so forth, should still be free. But most of the leaders of the day were willing to join in the passing of the Alien and Sedition Acts.

So we had the beginnings of the theory, but it wasn't full flesh and it had no protection. It grew into what it is today.

Unfortunately, it is not true that the framers sat down in Philadelphia and said a press, even if it is wrong, even if it is vicious, even if it opposes us, must be protected. High school textbooks suggest to us that that is so, but it isn't. We had to grow into that right. We did not understand it from the beginning.

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[4] C. Edward Wilson, *Teeming Invective: 300 Years of Vigorous Journalism,* (1976) at pages 17-18.

[5] *History of Journalism in the United States,* p. 116.

The CHAIRMAN. Barry?

Senator GOLDWATER. It is rather difficult for me to phrase this question because I don't know whether it applies to freedom of the press or freedom of the reporter.

In my younger days a reporter was taught to report the news. Today it is very difficult to find such reporterial practice. I find many reporters, both in the printed media and the electronic media, who editorialize. Now in doing that, sometimes the truth is overlooked or is circumvented.

Would that be an abuse of the meaning of freedom of the press?

Mr. ARMOR. Well first of all, the only totally accurate reporting in the United States is the stock tickers.

Senator GOLDWATER. The what?

Mr. ARMOR. The stock tickers, New York, American and NASDAQ, because they report just when it happened and what the price was and what was sold and that is precise. They don't say why and they don't say who was involved. As soon as you start getting into the subjective factors, you start getting inaccurate.

And the press has always been inaccurate. It is a delightful experience, and I encourage anyone to try it, to go to the Library of Congress and read the early American press because it was not just news. It was entertainment, it was poetry, it had laughter in it, and it had these vitriolic attacks. No question that a good bit of what they printed was inaccurate. For instance, one of them told of a doctor who had removed a 40-pound gallstone. I sincerely doubt that was true, but it was reported as if it were.

So the first thing is, there is no such thing as a true press. All of it is inaccurate to a certain extent, and part of it depends on the perceptions of the reader anyway. Do you agree or disagree with their views?

So the answer, in Jeffersonian terms, is the press should be free to be wrong, just as the American people, under the democratic principle, should be free to be wrong. The buck has to stop somewhere, and in the democratic process, if the people make a mistake, it is their mistake and they have a right to it.

In press terms, if any element of the press makes a mistake, as Jefferson said, truth and error should exist side by side because we cannot be sure which is which and because in the process of communication, it will be sorted out.

The dangers of any process of saying this is true and this is not true are too great for the benefits to be gained by whatever board of censors it is, saying we find this to be true and that not.

It goes all the way back to Galileo and the Catholic Church. They did not like his view that the Earth went around the Sun, so he was accused of heresy and silenced from publishing his views. It didn't change the fact that the earth went around the sun, but it did affect communications, and that is what we're talking about today. It is the heresies that really need protection. It is what may seem most obviously to be an error that may turn out to be true.

So our assumption in our system is to tolerate that. The question you posed in the beginning in your remarks is simply an insoluble one. Who shall guard the guardians? I don't remember my Latin well enough to give it to you in the original. But that is the problem. No one can be so pure and right as to determine what is true and what is not true, and therefore the trial and error process is sloppy, like democracy itself, but as Winston Churchill said, nothing else seems to be better.

So we have to tolerate the problem you mentioned, but it is not a new one. I encourage you, Senator, to read some of the colonial newspapers. There are not many of them on microfilm at the Library of Congress, and it doesn't take long to read them. They are absolutely fascinating. And they are also badly wrong in a number of cases.

Senator **Goldwater**. I don't go back to the colonial days.

Mr. **Armor**. I know you don't.

Senator **Goldwater**. Some people think I do. I can remember the press of years past, and I had the same feeling. We would say oh, this is a Republican paper or this is a Democratic paper, and the two were more or less expected to argue.

The point I am raising comes to probably everybody who serves up here on the Hill where we are privy to the events of every day as they happen, as they are spoken, as they are argued. Then we look at the report of it on the evening news and many times I say my God, I must not have been there because that wasn't said. Or I pick up the morning paper and say well, I agree with this, but nobody said that.

Now that is the type of press honesty I am getting at. But I can agree with you that under the first amendment, it was never intended that the Constitution necessarily be the judge of truth and honesty.

Mr. **Armor**. Well in part, Senator, what you are getting at is that press media, whether print or electronic, who pretend to impartiality, may in fact do us more harm than good. As you said, and it is true in the history of journalism, you go back a while and you see papers that were aggressively partisan in a certain way. They made no bones about it. They would state it on their masthead, state it in their editorials and then they would go at it hammer and tong in the news columns.

But those who try to paint themselves as a self-appointed oracle of Delphi, saying nothing but truth appears in these pages and nothing but truth appears on this nightly news—I'll skip names but you can stick them in wherever you care to—cannot be accurate. They cannot deal in nothing but truth. In fact, there is a bias—and I know this; I have been a published writer for 20 years now—there is no way to remove from what you write some element of who you are, and you can't do that as an editor either.

Therefore, there is no such thing as an impartial single medium of communication. It will reflect the people who own it, the people who edit it and the people who write it. And is it not perhaps better to use the frank partisanship that has been our history for 150 years, rather than the suggestion that certain sources are above partiality? None are.

And I know what you are talking about. I first saw it when I was 12 years old. My father told me about something he had attended; I read it in the Evening Sun and it wasn't the same way. I am not picking on the Sun. They all make mistakes.

Senator **Goldwater** I don't think I am getting at that point, and I doubt that I can get to the point. I have asked several of the more prominent national observers or writers. I remember once asking Walter Cronkite, whom I believe was held in the highest esteem, why it was that he couldn't help but show his personal feelings. Well, he said you are a constitutional Republican; I am more or less a constitutional American, and if I am writing about somebody that I inwardly distrust or dislike, I can't hide that feeling, no matter how I try to do it.

On the other hand, I know many observers we have worked with on the Hill who are impeccably honest in their writings and in their observations.

What I am getting at, and I think you backed this up, is that we pretty much have to buy that, accept it, and come to identify it in each person, and thereby be able to put a value on that person's reporting. Someone who disagrees with me might reverse the values.

But do the American people do this? I think the American people merely pick up the paper, and because the paper they respect and admire and read runs certain writers, they more or less accept that as true, when a thoughtful, on-the-spot analysis would show it was not true.

I don't think over 10 percent of the public pay much attention to the editorial pages, where the type of writing I am speaking about appears, and I might say that the editorial page is owned by the publisher so he can print what he damned pleases.

But I get to the question of can the columnist do that? Or can the ordinary reporter, if there is such a thing, instead of reporting what we are saying here today, come out and give his opinion, without saying "in his opinion," that this is what took place?

Mr. **Armor**. Well, of necessity, all news reporting shortens, and every time you shorten you have the potential for inaccuracy. Some are very scrupulous about trying to do a fair job, and I have publishers in my family, one of whom owned and edited a paper for 50 years in West Texas.

But no matter how hard you try to get accuracy, there will be some inaccuracy, and then you get to the judging techniques and you talk about respect for the paper or respect for the individual. That is just the shorthand by which in all our relationships we determine whether to trust or not trust a source.

And you have to do it. There is not enough time in the year to do the kind of research that a Senator would have to do to judge a day's contacts without dealing with the respect principle—is this a good person or a good source, normally known to be accurate, and therefore I will trust them on this occasion? They may or may not be right on this occasion, but you have to go on trust.

Mr. **Smith**. We would also hope, I think, that the media hold itself accountable, because it is a matter of credibility. When somebody makes an error, when they do predicting in reporting, when they make an error in fact, if that paper has an ombudsman, as some do, they may point that out, or their competition would point that out.

If I could enter just one historical footnote, the next report the foundation is working on happens to be on the Alien and Sedition

Act, and I did want, because I think that is going to come up again, to make a point about them.

First of all, the Alien and Sedition Acts were passed in 1798, 7 years after the first amendment. They were passed in an atmosphere of crisis. 306 American ships had been sunk by the French. The reign of terror was in full force and there was a scare in this country that Jacobins were going to come into the country and subvert it.

Despite that attitude of crisis and the dominance of the Federalist Party led by Hamilton at that time, the Alien and Sedition Acts were passed by the Senate but hotly debated in the House and barely made it through the House of Representatives at that time.

Almost instantly Madison and Jefferson began offering resolves asking the States to resist the Alien and Sedition Acts. They ran out, in 1801, and their imposition resulted—probably was the primary factor—in the defeat of the Federalist Party in the election of 1800.

So I think that when the Alien and Sedition Acts come up, one ought to look at them in that context, rather than assuming that it was a normal legislative process.

Senator **Goldwater**. You say your family is in the newspaper business in West Texas?

Mr. **Armor**. One example of good reporting is in Lubbock, Tex., the Avalanche Journal.

Senator **Goldwater**. West Texas takes care of its newspapers.

The **Chairman**. And cattle rustlers.

I might end with what Barry said. Seldom have I had problems with the press in terms of accurate reporting. Sometimes when they paraphrase something they may not paraphrase it exactly the way I would have wished, but my greatest problem with the press comes when they accurately report things I wish I hadn't said. I guess I can't blame them for that.

Gentlemen, thank you very much. We appreciate it.

Next we will take Prof. Thomas Krattenmaker from Georgetown, who has been a witness before this committee on a number of occasions.

Good morning, Professor. Go right ahead.

STATEMENT OF THOMAS KRATTENMAKER, PROFESSOR, GEORGETOWN LAW CENTER, WASHINGTON, D.C.

Mr. **Krattenmaker**. Thank you, Mr. Chairman. Thank you for inviting me. I have been here and testified on this topic with you all before. In fact, I am beginning to feel that I have tenure in this chair. It is a happy feeling, I must say.

I have a prepared statement, Mr. Chairman, but with your permission I will not read the statement, but perhaps summarize it.

I wanted to add something to what I talked about before but without being repetitious of what we have discussed here before, so what I mention today is why it is that I think people who are proponents of the kind of regulation that this bill would do away with, why I think proponents of those regulations are wrong.

I think the Freedom of Expression Act is important and timely legislation and I wholeheartedly support it. I believe that as the hearings unfold—I suspect you already know this—that you are going to find a number of people who oppose the bill because they believe that the present system of regulation, which the bill would displace, is a sensible one.

The kinds of regulations we are talking about here are principally those that involve the fairness doctrine, certain access rights, the right of reply doctrine and some content regulations that the Federal Communications Commission imposes. And it is my judgment that you are going to find a number of people whose views I think deserve very great respect who will argue that these regulations are helpful or necessary to insure that we avoid having a monopolized public debate and a broadly informed American citizenry.

I think that those arguments are wrong, Senator, and if I may, I would like to explain why I disagree. Certainly I think that if we take as our starting point the welfare of American citizens and of the viewing public, the people who would support these regulations have the correct kinds of goals in mind; that is, what we seek is a widely informed citizenry and a nonmonopolized media.

I think that supporters of the regulation, however, are engaging in wishful or untutored thinking about how we can attain these first amendment goals. In particular, I think that proponents of retaining the present regulatory system fail to take account of three pragmatic limitations on what such regulation can achieve.

First, regulation of broadcast programs does not substitute viewer or citizen control for broadcaster controls. It substitutes monolithic governmental bureaucratic choice for the programs that otherwise would result from broadcasters competition for viewers time and attention.

I believe it is a common myth to look at, for example, the fairness doctrine, and believe that its purpose is to allow the citizens to control what it is that goes over the media. The fact of the matter is that the fairness doctrine is applied commonly by a GS-12 attorney about 28 years old in the bowels—and I use that term advisedly—in the bowels of the Federal Communications Commission. It is not viewers or citizens who control the access doctrine. It is basically young attorneys at the Federal Communications Commission.

The second kind of mistake that I think proponents of regulation are making is they do not realize or don't sufficiently account of the fact that regulation does not compel fairness or access. At most, it avoids the appearance of onesided presentations.

If we applied the fairness doctrine to the fairness doctrine itself, it should probably be called something like the nonobviously unfairness doctrine. That is, these regulations do not in fact compel broadcasters to be fair or to provide access. At best, they say if you do something, then you must do something else.

For example, if you want to broadcast a program about oil production, then you must include the view that oil production is subject to control by a conspiratorial oil cartel. One can avoid presenting that side of the issue by not presenting the other side. Just don't broadcast the program about oil production, and there won't be any issue raised with respect to fairness or access.

The third mistake that I think proponents of this regulatory regime make is that they overlook the fact that regulation is not costless to the government or to those who are subjected to it. Because these regulatory schemes cost money, they have to be parceled out. At any time, and particularly at the present time, that means that resources for enforcing the fairness doctrine, access rules, right of reply doctrine, are going to be scarce. There is going to be a limited amount of nonobvious, anti-non-unfairness, whatever you might call it, enforcement going on in the country at any one time. And it is all dependent on the amount of money that is allocated to the FCC.

Second, because regulation imposes costs on those who are subjected to it, those people have every incentive to avoid those costs. Because they can do so by being silent or by programing that offends no one, they are likely to choose those kinds of options. Regulation, that is, is at least as likely to induce self-censorship as it is to provide more information, more viewpoints, or greater diversity.

Mr. Chairman, I have yet to see a defense of the present regime of broadcast content and access regulation that even takes account of, much less explains, how we could avoid these practical limitations on the utility of this method.

Moreover, if one were to come forward and to defend regulation on terms that deal with these questions, that would really only begin, not end, the analysis because the question will remain whether there is not a more practical way to achieve the goals of wide dissemination of information than to undertake this kind of regulatory regime.

I think there is a clearly preferable alternative, and it is to rely on competition among broadcasters for viewers' time and attention. I think that that method is at least as likely as regulation to serve the public interest that both proponents of regulation and I value.

There are at least two reasons why I think I am at least entitled to begin by carrying the burden of proof on this question, that competition is a preferable mode to regulation here. First, competition is the method that is applied successfully to every other medium of mass communications in this country. We don't have fairness or access or right of reply doctrines for films, newspapers, books, the live theater; yet all of these seem to flourish in an environment in which it is competition among these media for the time and attention of viewers that moderates any excesses.

Second, it appears that competition is the method that was adopted by those who founded our government. If I may, I would like to read you something that my mentor in this area, Justice Harlan, wrote in 1971 in the case of *Cohen* v. *California*.

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove government restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport the with premise of individual dignity and choice upon which our political system rests.

I do not see how that view of the first amendment can be improved upon, or how it can be embraced by proponents of the regulations this bill would abolish.

Mr. Chairman, I have already taken up a good deal of your time. Why don't I stop here and see whether there are questions I might answer.

The CHAIRMAN. Professor, let me ask you this question. Witnesses testifying in favor of this bill or certainly the concept of the bill, although the witnesses might have some slight disagreement with some portion of the bill, and usually it is not the fairness or the content doctrine but something further down in the bill, are the American Newspaper Publishers Association; the American Society of Newspaper Editors, who anyone versed with the trade associations in the print business knows that those two do not necessarily always agree with each other; Sigma Delta Chi, which is the journalism professional trade association; and the Association for Education in Journalism and Mass Communication, which are the deans of the schools of journalism.

I don't think anyone would accuse those groups of being liberal or conservative, and yet they all favor the legislation or certainly the major part of it.

The opposition seems to be coming from very conservative or very liberal groups. We will have testifying in opposition Accuracy in Media, which is normally regarded as a conservative group; and the Media Access Project and Telecommunication Research and Action Center, which are normally regarded as liberal. We will have opposing the bill, and I don't know where these fall in the scheme of liberal or conservative, but they often do not agree with each other, the Anti-Defamation League and the National Association of Arab-Americans.

I know the latter two will argue that on occasion, either Arab-Americans or Jews are badly portrayed by the media, and there must be some right of reply.

The liberal groups, such as the Media Access Project, are going to argue that if Government doesn't compel children's television, there will be no children's television. It would seem to me that you can put in dot, dot, dot for whatever it is that you think is a worthy social purpose, and we should attempt to compel it.

What I discover with the very conservative and very liberal groups is that they both legitimately think that the media should be used to help obtain their social purposes. And you phrased it very well—when they are in control of Government, in control of the FCC, they can help do that. When they are not, they can complain about the FCC and hope that they are in control again.

I would pose a specific question. Let's take children's television. What is the answer to the argument: We will have no adequate programing for children if it is not compelled by the Government?

Mr. KRATTENMAKER. Children's programing, Mr. Chairman, is a special problem because to simply rely on competition may not work in a medium which is largely funded by advertiser revenues. Advertisers are not interested in reaching children. There may be what the economists call a marketplace failure problem here.

Nevertheless, it seems to me that I am not sure that this bill would prevent—I don't read this bill as preventing the Federal Communications Commission from taking steps to see that there is more available children's television programing. I do think that this bill, if passed, would make it difficult for the Commission to identify specific programs or one specific program type and insist on a certain number of hours be devoted to that.

I think the basic answer is that the Government is not going to be able effectively to compel more children's television programing unless the Government is going to produce and air that programing itself. How is it going to define what it is that constitutes children's programing? How is it going to define how many hours are required to be shown?

What we have observed—and by the way, the Federal Communications Commission has put out a number of excellent factual reports on children's television—what we have observed is that as the number of outlets of electronic media have increased, since cable has come along, as MDS has come along, increasing amounts of time are devoted to children's programing because there is an interest in getting the time and attention of children, partly to sell the service to their parents and partly because of hopes that the parents will see some of the advertising. A very consistent line there.

The **CHAIRMAN**. What you are saying is that on cable, and assuming we are soon going to be at 20, or 25, or 30, or 35 channels, one channel is going to say there is a market for children. The parents will buy it because they want their children to be seeing children's television. With cable television, it can be specifically targeted, like radio. You are not going to need 30 percent or 20 percent of the audience. You can literally make money on 3 or 4 percent of the audience if you target it carefully.

Mr. **KRATTENMAKER**. Oh, certainly. The other thing one might do is look at—people are fond of looking at the competing alternatives. I was thinking when you mentioned the antidefamation groups that are coming here that you might ask them whether they want the fairness doctrine to apply to the Merchant of Venice, whether Shakespeare should be removed from the curriculum because he didn't obey the fairness doctrine.

The **CHAIRMAN**. The question would be whether or not he should be placed on television.

Mr. **KRATTENMAKER**. I guess the question is whether it can be aired on television; yes. To me it is a shame that here in 1984 we are debating that kind of question, that it would be a legitimate question to ask, as we are almost into the 21st century, as to whether television is ready for the Merchant of Venice.

You might also look in the newspapers. Is there children's programing in newspapers? Yes; I have noticed when the newspaper comes into our house that not only my wife and I but both my young boys usually find something that they are interested in reading in the newspaper.

What has principally made children's programing a difficult issue has been not the lack of any kind of power in the FCC or questions about content regulation. It has been the economic structure of the broadcast media. Where we are limited to a three network and only three network, closed entry system, then certainly no one of any three stations we have is going to be interested in competing for children's time, when you can compete for those higher upscale demographics.

As we break down those entry barriers and provide more and more outlets into homes, there will be much more interest in programing for children.

The **Chairman**. Barry?

Senator **Goldwater**. Just one question. In the findings section of the bill, it says "Regulation of the content of information transmitted by the electronic media infringes upon the First Amendment rights of those media."

Would you agree with that?

Mr. **Krattenmaker**. Yes, sir, Senator Goldwater. I would. Perhaps I should explain a little bit. I was on a panel once with a very distinguished lawyer and I asserted that something violated the first amendment rights of the media and he got very mad at me because the second circuit had held it was constitutional. He said how can I be telling people something is unconstitutional when two judges in New York said it was constitutional?

Much of the regulation that is presently in place today, Senator Goldwater, has been authorized by the Supreme Court, principally through the *Red Lion* case or what is commonly referred to as the *Carter-Mondale* case. I believe those cases are wrongly decided, and I believe that a right view of the first amendment would lead to the conclusion that these regulations are unconstitutional.

I also believe that this Senate has as much claim to authority to understand what the Constitution means as does the U.S. Supreme Court. That kind of explanation I believe would be a perfectly appropriate thing for the Senate to find, that the first amendment rights of operators of television stations are infringed by these regulations.

Senator **Goldwater**. I wish you could get the Supreme Court to agree to that.

Mr. **Krattenmaker**. So do I, sir. It looks very unlikely that you can.

Senator **Goldwater**. I wish the Supreme Court would agree with what you said, that we know as much about the constitution as they do.

Mr. **Krattenmaker**. Oh, you mean with respect to all constitutional questions? I guess we will take that up at another time.

Senator **Goldwater**. Thank you very much.

The **Chairman**. Let me ask you a further question. Assume no legislation is passed at all, that the freedom of expression bill doesn't pass and we just go along as we are going. The content doctrines don't change, the Commission may or may not change.

What happens when the following case gets to court, when this is an actual fact? I talked with a publisher of a series of small dailies in downstate Illinois. They also have a 10-percent interest in a cable company. They are distributing their editorials, including endorsements, on the cable. Last year they were doing it just in text, but this year they were thinking about going with video.

And I said to the publisher, well, what do you do when people ask for a reply? He said well, no one has asked. I said what are you going to do when they ask for a reply? He said we will refuse it. I said, on what basis? He said the first amendment.

Now what happens if a case like that gets to court? It is a newspaper editorial. A newspaper is putting it on the cable and out it goes to the viewer.

Mr. **Krattenmaker.** On the law right now, Senator Packwood, in the absence of the Freedom of Expression Act, the individual whom you described is in for quite a shock when he declines the right to reply and goes to his lawyer to find out if what he did was permissible or not. He will run into an FCC regulation that says it is wrong, and the Supreme Court cases certainly don't prescribe a clear answer, but at the moment would be on the side of upholding the regulation on the grounds that what this individual is doing is using the electronic medium, a scarce commodity, to propagate his own views without giving citizens the right to hear the other side.

Some of the answer to this would be all wrapped up in some technical minutiae, like was some of the signal actually broadcast over the air at one time, but I don't think you want to get into those issues.

The **Chairman.** No; I know what you mean in terms of over the air broadcast and origination on cable and all of that. But those are technical distinctions that get more and more difficult. They involve whether you are picking up somebody else's signal or originating your own, or what do you do if you have a Red Lion situation where somebody comes in with a videotape for playback. Are you the originator? I suppose you are if you play it over your station.

Mr. **Krattenmaker.** I suppose so. In *Red Lion* itself he was simply playing a tape.

The **Chairman.** Yes; as I recall, Billy James Hargis was sending out tapes for stations to play.

Mr. **Krattenmaker.** That is correct. But the short answer in your cable situation would be that that cable operator is in trouble, but of course not with respect to his newspaper. The newspaper can continue to decline the other side and as you pointed out, that is the *Tornillo* case.

The **Chairman.** No; there is no equal space statute in Illinois, to the best of my knowledge.

Mr. **Krattenmaker.** And if there is, it is unconstitutional.

The **Chairman.** I hope that remains the outcome. I don't think newspapers are going to disappear. There are enough people around like you and me who like to tuck them under our arms and read them, and they will always be available. But more and more information from newspapers is going to be simulcast, if we can call it that. Information will be printed and broadcast in some fashion. It is going to be a very difficult situation if papers are broadcasting all of their editorials and all of their comments and all of their columns, and on the one hand there must be a right of reply for the broadcast portion but none for print. My hunch is that the newspaper just will not broadcast information under those conditions. It will not be worth that.

But at some stage, as we go more and more toward electronic transmission, isn't the court eventually going to come to a rock and a hard place? They are either going to have to say indeed, the newspapers are electronic—the *Miami Herald* case at the Florida level—or they are going to have to say all of our past premises were based on scarcity and those facts no longer apply and the first amendment now covers all forms of communication. They have to go one way or the other, don't they?

Mr. **Krattenmaker**. Mr. Chairman, I think that is quite correct. I don't know what the rules of this committee are, but if I can incorporate by reference my earlier testimony, as you know, we had a session I guess in the fall of 1982 when you had really excellent hearings on this question itself. What was it that justified this dual system of constitutional rights with respect to the mass communications media?

I had some small piece of testimony in what was otherwise a very fine set of hearings and I think a number of people explained in some detail exactly what you said. The courts will be between a rock and a hard place.

We have, as I think my prepared statement for today expressed it, two distinct first amendment constitutional doctrines with respect to mass communications media, and there is no principled basis for determining which doctrine applies to which medium of communication. But they are out there. One is typified by *Tornillo;* the other is typified by *Red Lion.* One says the press is required to give fairness and access—that's the FCC regulations. The other says that to impose these kinds of regulations violates fundamental first amendment rights. That is typified by the *Tornillo* case.

Your questions, Mr. Chairman, point out that this is like an Alice in Wonderland word game that we will now begin to play in determining which of these principles applies to which medium. This cable operator, who is transmitting his newspaper programing—well, if you hadn't given the example here in open committee I probably would have written it down and taken it back as an exam question. It is so impossible to resolve.

The **Chairman**. Professor, thank you again for coming. We appreciate it.

[The statement follows:]

STATEMENT OF THOMAS G. KRATTENMAKER, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY

I support, wholeheartedly and enthusiastically, the Freedom of Expression Act. It is timely and important legislation that is both well-drafted and appropriately titled.

The act would achieve such extensive reform that the number of issues worth discussing far exceeds the time I can take in commenting on it. Accordingly, I will confine my prepared remarks principally to a single issue I have not previously addressed: why proponents of the present system of broadcast program regulation seriously underestimate the value of that system. I would, of course, be delighted to answer questions on any other topics that interest the Committee.

In September 1982 I testified before this Committee on the constitutional crisis that is arising with respect to the first amendment status of mass communications media in the United States. To summarize, and somewhat oversimplify, that testimony, we face today two distinct constitutional doctrines respecting the amenability of mass communications media to fairness, access and morals regulation, without any principled means of knowing when one or the other applies. One doctrine, applicable to the "print" or "non-broadcast" media, holds that such regulations are impermissible. The other, governing "broadcast" media, teaches that governmentally assured fairness, access and morality is not only tolerable, but actually furthers first amendment values. Yet no a priori or impirical method exists for distinguishing the supposedly different media that are subject to these contradictory constitutional doctrines.

The Freedom of Expression Act adopts the cleanest and wisest method to cut that Gordian Knot. It would repeal the statutory authorization underpinning those special rules applicable to the "broadcast" or "electronic" media, whatever they are.

But the virtue of the present bill is not that it harmonizes discordant legal doctrines. A constitutional amendment applying broadcast rules to the print media would also do that. Nor is it that it clarifies the law. Legal confusion would also be ended by a rule requiring government clearance of all public utterances. The virtue of this act is that it would move the law in the proper direction.

To explain why I think the Freedom of Expression Act is wise policy, I wish to attempt to anticipate and answer criticisms it is likely to receive from persons whose views deserve great respect. A very large number of informed, sincere, broad-minded and fair-minded persons, whose sole concern (as mine) is with the welfare of TV viewers and American citizens, strongly believe that sound public policy supports the regulatory regime (principally, fairness, access, right of reply and content regulations) that this bill would undermine. They would argue, I believe, that such regulations are helpful or necessary to insure that public debate is not monopolized, that citizens are broadly informed, that Americans be exposed to a true marketplace of ideas, that this marketplace not be poisoned by distortions, half-truths or crude and offending utterances.

Their goals are laudable. They reflect precisely the ideals that underly the first amendment. I believe, however, that the view that regulation is therefore desirable is the result of wishful or untutored thinking about how these first amendment goals can be attained. In particular, I think proponents of retaining the present regulatory system fail to take account of three pragmatic limitations on what such regulation can achieve:

1. *Regulation of broadcast programs does not substitute viewer or citizen control for broadcaster control.*—It substitutes monolithic governmental bureaucratic choice for the programs that otherwise would result from broadcasters' competition for viewers' time and attention. When fairness and access regulations are in place, God doesn't determine whether a program is fair; that determination is made in the first instance by a 28-year-old GS-12 attorney, in the Mass Media Bureau of the FCC. Conversely, when fairness regulations are not in place, speakers have little to gain, except lost audiences, by misinforming their listeners.

2. *Regulation does not compel fairness or access; at most, it avoids the appearance of one-sided presentations.*—Unless we are able to identify specific programs that should be broadcast and willing to require broadcasters to exhibit them, all that regulation can accomplish is to say that if you do X (e.g., broadcast a program on oil production) you must also do Y (e.g., include in the broadcast both the view that oil production is and is not dictated by a secret cartel). Under such a regulatory system, the broadcaster can always choose not to do X. Having avoided the appearance of bias, the broadcaster has violated no fairness or access regulation. But, of course, neither has the broadcaster (nor, of course, the regulation) furthered any public interest by its silence.

3. *Regulation is not costless to the government or to those subjected to it.*—This has two consequences. First, because it costs the government money to regulate, no censorship regime assures fairness, access or non-offensiveness. It assures, at most, that amount of protection that the taxation and budgeting processes make possible. Put more concretely, access will protect you only if your friends run the FCC. Second, because regulation imposes costs on those subjected to it, they have every incentive to avoid those costs. Because they can do so by silence (or by programs that can offend no one) they are likely to choose these options. Regulation is at least as likely to induce self-censorship as it is to provide more information, viewpoints or other diversity.

I have yet to see a defense of the present regime of broadcast content and access regulation that even takes account of, much less explains how we could avoid, these practical limitations on the utility of this method. Furthermore, were such a defense attempted, it would only begin the analysis, not end it. For the question would remain whether there is not a more practical way to achieve the goals of regulation. In my view, a preferable alternative clearly exists.

Competition among broadcasters for viewers' time and attention is at least as likely as regulation to serve the public interests that proponents of regulation and I value. Certainly, competition is the method that is applied successfully to every other medium of mass communication in this country. No regulation required that the movie "The China Syndrome" adequately protray all views on the risk of meltdowns in nuclear power plants. No law required that the Washington Post newspaper cover the significant and controversial local issue whether to build a D.C. convention center. No rule required Richard Nixon to give equal time to George

McGovern's campaign platform in his Memoirs. No government agency saw to it that individuals attacked in Gilbert & Sullivan parodies had a right to take the stage to deliver rebuttals. Films, newspapers, books, live theater—together with all other media, they flourish under a regime that eschews governmental assurance of fairness for the results generated by popular choice among competing voices.

Certainly, competition is the method adopted by those who founded our government. As Justice Harlan wrote, "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us in the hope that use of such freeedom will ultimately produce a more capable citizenry and more perfect policy and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." Cohen v. California, 403 U.S. 15 (1971). I do not see how that view of the first amendment can be improved upon or how it can be embraced by proponents of the regulations this bill would abolish.

The Freedom of Expression Act is a very fine piece of legislation, in my view, and I hope the Congress sees fit to enact it. It is not, however, all that needs to be done and I would be remiss if I stopped with a simple endorsement of the bill. This act would address one of two unconscionable assaults on fundamental first amendment values perpetrated by the Communications Act of 1934 and its enforcers. The other, equally damaging, actions were a series of steps, implemented principally by the FCC from 1946 to 1976, that restricted entry into U.S. television broadcasting, unnecessarily limited the number of viewing options available to most U.S. TV viewers and saddled the television industry with a dominating, sheltered, three-and-only-three network hegemony.

In the past decade, the FCC has taken several positive steps to alleviate the effects of its earlier restrictive policies. I believe that proponents of the Freedom of Expression Act should support, encourage and demand continued deconcentration of the television industry and hope they will do so.

The **Chairman**. Next we will take Dr. Robert S. Powers, who is the chief scientist at the Federal Communications Commission.

Good morning, Doctor. Why don't you go right ahead?

STATEMENT OF DR. ROBERT S. POWERS, CHIEF SCIENTIST, FEDERAL COMMUNICATIONS COMMISSION

Dr. **Powers**. I am pleased to be here this morning, Mr. Chairman, to discuss with you some aspects of how both engineering technology and the techniques of spectrum management relate to the availability of radio spectrum for broadcast purposes.

I hope to make three points this morning.

The **Chairman**. Doctor, before you start, could you give us a bit of your background? You are not a political appointee of the Federal Communications Commission?

Dr. **Powers**. Certainly, Mr. Chairman. I was trained at Southern Methodist University in chemistry and mathematics and at the University of Wisconsin Graduate School in the field of physical chemistry. Then I held a postdoctoral fellowship at the National Bureau of Standards in Boulder, Colo., where I worked, as it turned out, for about 10 years. Then I came to Washington for a 1-year appointment in the late 1960's and haven't quite got back to Boulder yet.

I worked at the Commerce Department, in what is now the National Telecommunications Information Administration, and then moved to the Commission in 1975 in the Cable Television Bureau, and then to the Office of Science and Technology in 1979.

The **Chairman**. And you are now a career person at the Federal Communications Commission?

Dr. **Powers**. That is correct.

The CHAIRMAN. And you hope to remain that way?

Dr. POWERS. That is exactly right.

The CHAIRMAN. I see that you have written a variety of articles, the titles of which are quite arcane, but I judge by reading them that many of them relate to communications frequencies and the technicalities of transmission.

Dr. POWERS. That is correct, Mr. Chairman.

The CHAIRMAN. Go right ahead.

Dr. POWERS. The three points that I hope to support this morning are first of all, that there is no inherent shortage of spectrum capacity from the technological point of view.

The CHAIRMAN. Could you state that again.

Dr. POWERS. There is no practical shortage, Mr. Chairman, of communications capacity represented by the radio frequency spectrum from the technical point of view.

The CHAIRMAN. You are not suggesting that everybody can afford an outlet? You are simply saying technically, there is no shortage.

Dr. POWERS. That is right, in the sense that one can always squeeze in a little bit more service if you decide you want to and make the effort, spend the money that it costs to do so.

The second point relates to that very comment—that there are indeed costs associated with most of the proposals that are intended to increase the capacity of the radiofrequency spectrum.

But my third point is that there will continue to be many proposals, practical proposals, for which the costs can be considered normal costs of doing business and need not prevent us as a society from increasing spectrum use in the immediate and the long-term future.

The CHAIRMAN. When you talk about something like that, that is no different than the All-Channel Receivers Act. There was a cost associated with that in terms of manufacturing, but we decided from the standpoint of the merits of the policy, to go ahead and do it.

Dr. POWERS. Yes, there have been many instances in the past, and I will mention some specific ones, where the decision has been made to supply more service, increase the efficiency of the spectrum use, and it has cost money and we have gone ahead and done it.

The issue, of course, is not simply whether we can get more channels for broadcast and other purposes, but just how to judge when the spectrum capacity gained is worth that cost, who should pay those costs and in what form should the costs be paid? That is, through equipment improvements or some other rearrangements.

The communications capacity of the usable spectrum has steadily increased over the past six or seven decades, and there have always been those associated costs of technological development and implementation. Increased capacity has come from two kinds of progress.

First, we have stretched the high frequency limits of spectrum use, and second, we have continually made better use of the spectrum we have available. Scientists and engineers will continue to develop equipment for higher and higher frequencies, but for most broadcast purposes, the higher frequencies have some important limitations. However, there is still room for improvements in spectrum use, to increase the service availability.

We are all aware that in the last 30 years or so, there has been a vast increase in the number of broadcast outlets in this country. In my prepared statement there is a chart showing dramatic increases in AM, FM, and TV broadcast stations since 1953. Those numbers do not, of course, prove that the increase can continue indefinitely, though the increases have continued, even in the last few years.

However, give or take a few quibbles about where the geographical boundaries of TV markets really are, it is fair to say that we have pretty much run out of licensable TV channels in the top 10 markets in this country, given the present channel allotment scheme. But there are a number of ways to further increase the intensity of spectrum use; that is, to increase the amount of communications traffic which can be carried in a given amount of spectrum in a given geographical area.

I will be talking now about increasing intensity of use for both broadcast and nonbroadcast purposes.

Senator, are you looking for that chart?

The **Chairman**. I found it.

Dr. **Powers**. I am going to talk about both broadcast and nonbroadcast uses, since they are interlinked. The Federal Communications Commission must of course continually balance demands of both broadcasting and other users of the spectrum. The possibilities for spectrum use in any of the licensed services affect the availability of spectrum for all the other services.

The first way that I would like to mention for increasing the intensity of spectrum use is to use individual channels better. There are several examples. In the 1940's, the 6 megahertz television channel carried only a black and white picture. Today the same channel supports color, testing and color control signals in the so-called, vertical interval, Teletext, stereo sound, multilingual sound, noise reduction techniques, and captioning.

The original FM channel can now support stereo sound, quadraphonic sound, and multiple subcarrier services such as Muzak and reading services for the visually impaired.

The original AM channel now supports stereo as well as data transmission for utility load management and other uses.

In the land mobile services, digital technology and trunking can significantly improve channel use. Digital techniques permit printed or voice messages with use of far less spectrum than would be required by conventional techniques for voice messages. Trunking offers a way to increase the efficiency of spectrum use when several users share several channels. Trunking, to explain that term, is simply a way for a user who wants a channel to automatically search for an empty one, rather than having to wait until a particular assigned channel is free.

In the point-to-point microwave service, digital technology and techniques for carrying more than one signal at the same time on the same channel can multiply the usefulness of the channels.

There is another classic technique for more intensive spectrum use that involves decreasing the channel size itself to gain more channels per megahertz of spectrum. For example, land mobile radio channels have been decreased from 100 kilohertz bandwidth in 1945 to 50 kilohertz to 25 kilohertz, and the land mobile community and the Federal Communications Commission are now exploring techniques for five kilohertz narrowband channels, which is to say that at least in some cases, we may be able to achieve 20 times better use of the spectrum than in 1945.

Again, that is not a broadcast service, but the improvement means that we can put more service overall into the spectrum.

As you know, the United States recently considered reducing the AM broadcast channel spacing from 10 kilohertz to 9 kilohertz. It was decided by the Commission, however, that this particular step was not appropriate. Such a decrease in channel width is an example of a technically feasible idea for which the costs were judged to be too high.

A third class of ways to increase intensity of spectrum use is to implement more efficient geographical distribution of stations. In that way we could realize more of the potential of the so-called interference-limited broadcasting system, and provide a larger number of signals to each citizen. Use of advanced mathematical techniques, such as those developed for FCC by Decision-Science Applications, Inc., allows examination of options for station distribution.

There are several examples of spectrum management questions where such mathematical techniques can be used: addition of low power TV stations, addition of full power VHF, UHF TV and FM stations, and the question of how to share spectrum between land mobile and television services.

All of those classes of spectrum efficiency improvements do, however, imply costs that one has to consider. Those improvements may lead to obsolescence of existing equipment, as in the case of land mobile channel splitting. This can be especially important where large numbers of receivers in the hands of the public become obsolete.

Some improvements would require equipment modifications which seem expensive in comparison to the gains. Some could require modification of equipment whose owners would receive no direct benefit from the change. Both of these considerations were important in the case of the AM channel spacing question that I mentioned.

Some spectrum efficiency improvements would lead to increased levels of interference, as in the case of the proposal to drop in additional full power VHF television stations. Drop-ins are not at all infeasible from the technical point of view, but such proposals do lead to questions about what is an acceptable ratio of new service to new interference.

Bandwidth reduction may lead to modification of signal characteristics, which may be perceived to be good or bad.

Please, Mr. Chairman, don't misunderstand my point in discussing the various costs of expanded spectrum capacity. I do not at all mean to suggest that such expansion is too costly. On the contrary, I mean to suggest that such costs are normal, as they have been in the past when spectrum improvements have been made. We have paid such costs over and over again in the past to get where we are today, and we should expect to do so in the future.

In my prepared text I have included a brief description of the expansion of spectrum towards higher and higher frequencies over the last decade. Suffice it to say here that such expansion will continue, but broadcasting uses of the highest spectrum frequencies are limited.

In my view, are approaching the end of the frontier for using virgin spectrum for terrestrial broadcasting as we know it. However, because of the vast potential for increased intensity of use, the diminished importance of the frontier does not imply any fundamental shortage of spectrum for broadcast or other purposes.

Also in my prepared remarks I list a number of new broadcast or broadcast-like opportunities within the existing spectrum. I included multichannel, multipoint distribution service, satellite distribution of signals to cable TV systems and thence to the public, a couple of forms of TV delivery directly to homes via satellite, and additional channels in the AM broadcasting band. There are indeed several opportunities right now to increase broadcast channels.

Introduction of these broadcast and broadcast-like services does of course reduce the spectrum available for nonbroadcast services, and nonbroadcast users also come to the Commission with legitimate requests for more spectrum. In fact, some of those users have their eyes on broadcast spectrum.

For example, the sheriff of Los Angeles County has proposed a long-term transfer of some spectrum from UHF television broadcasting to public safety and other land mobile uses.

But then again, those other services also have technical options that could effectively increase their own spectrum capacity. I have already mentioned the existence of some narrowband technologies, digital technologies, and trunking.

Now there are some nonbroadcast alternatives that are worth mentioning here. A wide variety of nonspectrum-using but broadcast-like services is becoming available. These services add to the public's choice of information sources by supplementing, competing with, or for that matter, substituting for conventional broadcast delivery systems.

We are all familiar with the growth of cable television, particularly in rural and suburban areas. Cable offers, or is capable of offering, virtually as many channels as the public will support, possibly using fiberoptic technology as well as conventional cable.

There are other technologies as well, some of which tend to obscure the previously clear line between broadcast and nonbroadcast services. For example, Teletext carried by broadcast or cable TV; Videotex carried on phone lines; data bank services offered by newspaper publishers or other entities normally associated with print rather than electronic distribution systems.

In summary, I would suggest that taken together, the whole collection of media, from purely print media to Videotex and Teletext, to aural and visual broadcast media, can provide an enormous number of potential sources for entertainment and information. I see no fundamental technical limitation to the provision of those services, even if some of them require increased use of the radio spectrum.

As those services proliferate in response to market demands, it will indeed get harder to define sharp distinctions between broadcasting, where content controls have been exercised, and nonbroadcast delivery systems, where similar content controls have not been imposed.

The judgment as to whether the variety of information sources is enough to mitigate concerns about broadcaster domination of information pathways and opinionmaking is obviously not to be made by the technologists but through the political process.

However, it does seem fair for a technologist to assert that there is essentially no technological limit to the number of information sources which can be provided and indeed, can be controlled by different competing entities. In particular, the radiofrequency spectrum does not impose any fundamental limit to the potential for providing services to homes and business establishments.

There is, to be sure, a perceived need for more spectrum capacity than we are using today for nonbroadcast as well as broadcast. Therefore there is pressure for all users of the spectrum to move to ever higher frequencies, where that is feasible, to make ever more intensive use of the existing spectrum, and to utilize nonspectrum alternatives where possible.

There is no shortage of ways to move on all three of those fronts. In the particular case of information services to the public, there is a wide variety of technical alternatives, both spectrum and nonspectrum, to increase the number of services if the services themselves are economically supportable in the marketplace.

Thank you, Mr. Chairman.

The CHAIRMAN. Doctor, your testimony is crucial because much of the argument for regulation is based on the theory of scarcity. The argument of those who want to keep the content doctrines is that this is a scarce medium and everyone can't have a radio station or everyone can't have a television station. Therefore, it is important for the government, at least with those methods of communication, to make sure that citizens have a right of access.

During hearings a year ago, one of the witnesses was a man named Joseph Sittrick, who works for a firm that buys and sells newspapers and buys and sells television stations and radio stations. He is not an owner himself but he has experience with the market values of the different properties.

I am quoting here from his testimony.

> Within the past year, we sold a particular radio station for about $600,000. In that same market the daily newspaper has a value of about $20 million. In another media market, the newspaper was $100 million, one of the TV's is worth $20 million and the AM/FM is in the $3 million range. Further, in two other large markets, daily newspapers sold for $20 million and $95 million in 1980, while radio stations in those markets sold for as little as $600,000, the highest being $7.5 million.

Another witness who testified had done some research in response to a question I had posed. He was also a witness involved in buying and selling of news media properties. I asked him what it cost to buy or to start a radio station, a television station, and a daily newspaper in a small, medium, and large market. He said right off the top of his head, well Senator, I can answer those questions. We have bought and sold for many people. But he said as far as daily newspapers are concerned, the answer is almost nil. With the exception of Newsday on Long Island and the Gannett publication at Cocoa Beach and a paper in Tennessee that started up as a daily when another daily paper there was faltering, he said to his recollection there have been no successful daily newspapers started in this country since the end of World War II.

This was just at the time that the Washington Times and USA Today were starting. He said he didn't count USA Today, which he thought was a good newspaper, as a normal daily newspaper, and he said the Washington Times would or would not be successful depending on how many millions and millions and millions of dollars the owners want to pour into it.

So he said if you want to talk about scarcity, owning a newspaper involves scarcity. Some are failing. We have fewer dailies now than we had last year. We had fewer last year than we had two years ago. He said it is the broadcast properties that are increasing, and you've clearly corroborated that there.

So if there is scarcity, whether it is in terms of numbers or money, it is the print press that is scarce and hard to get into, not the broadcast properties.

Do you have any evidence as to how many radio stations were sold last year?

Dr. POWERS. Yes, Mr. Chairman. From our Mass Media Bureau in the Commission, I find that in 1983 there was a grand total of 1,875 actions in assignments and transfers in AM, FM, and TV. That grand total, however, I must point out, includes a fair fraction that were relatively minor changes, shifts in ownership among owners of the stations, where one bought more from another.

But in 60 percent of those cases, 1,125 of them, the assignment or transfer did involve new parties and the transfer of controlling interest in the station. So that's about 1,125 that really matter from the point of view of your question. About 10 percent of those transfers were challenged in front of the Commission and none of the challenges were upheld.

The CHAIRMAN. And with the remaining 90 percent, there wasn't even a challenge?

Dr. POWERS. That is correct.

The CHAIRMAN. So you had roughly 1,000 major changes of ownership in stations last year without challenge.

And in essence, what you are saying is if you have enough money, you can buy a station.

Dr. POWERS. That is correct.

The CHAIRMAN. And if you have enough money, you can buy a newspaper. It just costs a lot more money, all things being equal, to buy a newspaper in a market as opposed to a radio or television station.

Now again when we had testimony last year, Prof. Ithiel de Sola Poole testified. He is a social, not a physical scientist, from M.I.T, but he is well versed in communiations. He made the statement that if you were to take just one unused UHF television frequency and put it to a different use, you could have 200 new radio stations in the area.

I thought that was an extraordinary number, so I waited until Dr. Buchsbaum testified, who is one of the higher officials at Bell Labs and an expert in this same field. I posed to him Professor Poole's statement regarding unused UHF frequencies and 200 radio stations. He said well, of what quality? Of course he didn't mean program quality. He meant technical quality.

I said well, I don't know, just the kind we have now that you listen to for music or talk. He said no, I don't think 200. I said how many? He said up to 125.

Let's take the Washington, D.C., area, which is one that probably most of our listeners are familiar with. In your judgment, how many new radio stations could you create in the Washington, D.C., area out of one unused UHF franchise?

Dr. **Powers**. I think Dr. Buchsbaum's estimate is a little closer to practical reality. Dr. Poole of course is correct if you were talking about just serving Washington and no place else. But of course in the practical scheme of things, you would want to put some stations in Baltimore and Richmond and somewhere in Pennsylvania, too.

Just on my comparison, Mr. Chairman, of the number of new channels that we would get and the proportions of stations that we now have in Washington compared to the number of channels that are now available in Washington, I come up with an estimate of about 95 or 100.

The **Chairman**. New radio stations?

Dr. **Powers**. New radio stations.

The **Chairman**. In addition to the 30 or 40 we already have here?

Dr. **Powers**. That is correct. This is AM stations. We don't have 30 or 40 AM stations in the immediate neighborhood of Washington.

The **Chairman**. I was counting AM and FM. But do you mean that technically, we could have another 95 to 100 AM quality radio stations in this market?

Dr. **Powers**. That is correct.

The **Chairman**. I don't think the market would support that many radio stations.

Dr. **Powers**. That is quite possibly true.

The **Chairman**. You are just saying that technically we could have that many if we choose to have them.

Dr. **Powers**. There is an AM radio station just around the corner from where I live that went off the air a few years ago just because of economic reasons, as I understand it. It is back on the air now under a different owner with a different format, but that indicates to me at least that there is the possibility in the Washington market of stations not surviving in the marketplace. So 100 new channels would distinctly make a dent in that marketplace.

The **Chairman**. If there is anybody here from the NAB, they have probably fainted of heart failure right now at the thought of 100 new stations in this market.

I want to make sure I state it accurately, but as to both radio and television, there is at least no rational technical scarcity. I realize you cannot have 10,000 television stations in one area, but by any normal stretch of the imagination, there is no technical scarcity.

Dr. **Powers**. That is right, Mr. Chairman. I have tried to be very careful myself, as you are being, to differentiate between technical scarcity and economic scarcity. My economist friends say that anything that has a price on it is by definition scarce. If it is not totally free, it is scarce.

The CHAIRMAN. I understand that, but by that definition the content doctrines ought to apply to newspapers more than they apply to television. In most of the major markets in this country are lucky to have two major newspapers, but most have one.

I would wager that the New York Times or the Washington Post or any other dominant major daily is more influential on the public opinion of that area than any of the local television stations or radio stations may be. I don't know of any way of proving that but I would wager that to be true. I am not comparing the Washington Post nationwide to CBS or ABC or NBC, but I am comparing it to the local outlets of the television stations here.

Doctor, I don't believe I have any more questions. I will be quoting you frequently because the argument of scarcity is the one upon which the Supreme Court has hung its, in my mind, rather nebulous approval of broadcasting regulation. Whether or not that argument was valid 50 years ago is 50 years ago. You are saying that it is not technically a valid argument now.

Dr. POWERS. That is correct. And in fact, I would argue that it has been proved that it wasn't true 50 years ago by the tremendous growth in the use of the spectrum, and as one of the charts that I supplied in my written testimony pointed out, the expansion of the spectrum itself, which is not quite the point today that it was 50 years ago.

In preparing for this, one of my staff found a wonderful little statement from the early days of radio, where someone decided to put the radio amateurs at the then-considered high frequency limits because it was clear that it was of no use to anybody else and they couldn't possibly get out of their own back yard with those frequencies. If the good Senator Goldwater were still here, he would be giggling at the moment because he has himself far exceeded that prediction.

The CHAIRMAN. Doctor, I have no more questions. Thank you very, very much. It has been most helpful.

[The statement follows:]

STATEMENT OF DR. ROBERT S. POWERS, CHIEF SCIENTIST, FEDERAL COMMUNICATIONS COMMISSION

Good morning Mr. Chairman and members of the Committee. I am pleased to be here this morning to discuss with you some aspects of how both engineering technology and the techniques of spectrum management relate to the availability of radio spectrum for broadcast purposes.

I have three points to suggest to you this morning: (1) that there is no inherent shortage of spectrum capacity, from the technological point of view; (2) that there are indeed costs associated with with each step in increasing the communications capacity of the radio spectrum, but (3) that those costs are normal costs of doing business and need not prevent us from increasing spectrum use in the immediate and long term future. The issue is not simply whether we can get more channels for broadcast and other purposes; but rather how to judge when the value of spectrum capacity gained exceeds the cost of creating that capacity, who should pay those costs, and in what form should they be paid.

The communications capacity of the usable spectrum has steadily increased over the last 6 or 7 decades, and there have always been associated costs of technological development and implementation. The increased capacity has come both from stretching the high frequency limits of spectrum use and from increasingly more intensive use of the available spectrum. There is still room for more intense spectrum use. Scientists and engineers will continue to develop equipment for higher and higher frequencies, but for most broadcast purposes the higher frequencies have some important limitations.

In the discussion I will point out the growth of broadcast and broadcast-like services which do not use the radio spectrum. Supplying services by non-spectrum means helps in two ways: it relieves pressures for creating or re-allocating still more spectrum for broadcasting purposes, and of course it provides communication channels which are often equivalent to broadcast channels, from the point of view of providing alternate sources for information, opinions and entertainment for the public.

There is still another set of related developments which I would like to discuss briefly; namely, those techniques and services which tend to confuse the formerly clear lines between print media and broadcast media. These techniques are relevant to this morning's discussion because broadcasters can deliver more and more material which traditionally has been delivered by print media, and at the same time publishers of newspapers and other printed materials are moving into electronic delivery of information. Thus, it may become more and more difficult to rationalize different content restriction rules for "print" and "broadcast" delivery systems defined on the basis of yesterday's practices.

INCREASED INTENSITY OF SPECTRUM USE

We all are aware that in the last 30 years or so there has been a vast increase in the number of broadcast outlets in this country. Attached hereto is a chart showing increases of 92 percent in AM broadcasting stations, 561 percent in FM broadcasting, and 466 percent in TV broadcast outlets since 1953. These absolute numbers do not, of course, show that the increase can continue indefinitely, though the increases have continued even in the last few years. In fact, give or take a few quibbles about where the boundaries of markets really are, it is fair to say that we have run out of licenseable TV channels in the top ten markets, given the present channel allotment scheme.

But there are a number of ways to further increase the intensity of spectrum use; that is, to increase the amount of communications traffic which can be carried in a given amount of spectrum in a given geographical area. I'll be talking now about increasing intensity of use for both broadcast and non-broadcast use. Since the Federal Communications Commission must continually balance demands of both broadcasting and other uses of the spectrum, the possibilities for better spectrum use in any of the licensed services affect the availablility of spectrum for the other services.

First of all, individual channels can be used more intensely. There are several examples:

In the 1940's the 6 megahertz TV channel carried only a black and white picture. Today, the same 6 megahertz channel can support color, testing and color control signals in the "vertical interval," teletext, stereo sound, multilingual sound, noise reduction techniques, and captioning.

The original 200 kilohertz FM channel can now support stereo sound, quadraphonic sound, and multiple subcarrier services such as Muzak and reading services for the visually impaired.

The original 30 kilohertz AM channel now supports stereo as well as data transmission for utility load management and other uses.

In the land mobile services, digital technology and trunking can significantly improve channel utilization. Digital techniques permit printed or voiced messages with use of far less spectrum than would be required for full voice messages. Trunking offers a way to increase the efficiency of spectrum use when several users share several channels. "Trunking" is simply a way for a user who wants a channel to automatically search for an empty one rather than having to wait until a particular assigned channel is free.

In the point-to-point microwave service, digital technology and techniques for carrying more than one signal at the same time on the same channel can multiply the usefullness of the available channels.

Another class of techniques for more intensive spectrum use involves decreasing channel size, to gain more channels per megahertz of spectrum:

Land mobile radio channels have been decreased from 100 kilohertz (1945) to 50 kilohertz (1950) to 25 kilohertz (1965), and the land mobile community and FCC are now exploring techniques for 5 kilohertz narrowband channels.

The U.S. recently considered reducing the AM channel spacing from 10 kilohertz to 9 kilohertz. It was decided by the Commission, however, that this particular step was not appropriate. Such a decrease in channel width is an example of a technically feasible idea for which the costs were judged too high.

A third class of ways to increase intensity of spectrum use is to implement more efficient geographical distribution of stations. In that way, we could achieve more of the potential of a so-called "interference limited" distribution of stations, and provide larger numbers of signals to each citizen. Use of advanced mathematical techniques, such as those developed for FCC by Decision Science Associates, allows examination of options for station distributions. There are several examples of spectrum management questions where such mathematical technique can be used: Addition of low power TV stations; addition of more full power VHF TV stations; addition of FM stations (FCC Docket 80-90); addition of full power UHF TV stations permitted by elimination of certain rules for spacing of stations; issues of how to share spectrum between land mobile and television services.

All of the above classes of spectrum efficiency improvements do, however, have costs that must be considered:

1. They may lead to obsolescence of existing equipment, as in land mobile channel splitting. This can be especially important where large numbers of receivers in the hands of the public become obsolete. In particular, some of the technically feasible improvements which might be made redistributing UHF television allotments could require improvements in television receivers in the hands of the public.

2. Some improvements would require equipment modifications which seem expensive in comparison to the gains. Some could require modification of equipment whose owners would receive no direct benefit from the change. Both of these considerations were important in the case of the proposed reduction of AM spacing to 9 kilohertz.

3. Some spectrum efficiency improvements would lead to increased levels of interference, as in the case of the proposal to "drop in" additional full-power VHF television stations. This leads to the question of what is an acceptable ratio of new service to new interference.

4. Bandwidth reduction may lead to modification of signal characteristics, including perceived signal quality. For instance, there is a new type of signal available for land mobile radio services. The new modulation technique, called Amplitude Compandored Single Sideband, or ACSB, demands only one-fifth the spectrum used by conventional FM land mobile systems. There are differences in the resulting service. In my judgment the signal characteristics of ACSB are merely "different," not clearly either better or worse.

Please don't misunderstand my point in discussing the various costs of expanded spectrum capacity: I do not at all mean to suggest that such expansion is "too costly." On the contrary, I mean to suggest that such costs are normal, as they have been in the past when spectrum improvements have been made. We have paid such costs over and over again in the past, to get where we are today, and we should expect to do so in the future.

It might help to mention a specific example. The largest relocation of a group of licensees that I know of arises from the recent decision of the Commission to allocate the band 12,200 to 12,700 megahertz to the Direct Broadcast Satellite service. Implementation of this allocation will require that about 2000 terrestrial microwave links will have to move to other frequencies. The total cost of those moves is hard to estimate, but it could well be in the range of $40 million. In this case, it is easy to put these costs in perspective, in comparison to costs of the replacement service, DBS: It will cost something like $300 to $500 million for each DBS satellite, plus further hundreds of millions for subscriber earth stations. As high as the costs may seem to the displaced terrestrial microwave licensees, $40 million is not an outrageous sum in comparison to the anticipated value of the Direct Broadcast Satellite service.

HISTORIC GROWTH OF SPECTRUM

As measured by allocation table limits, usable spectrum has grown at an average rate of over 20 percent per year for over 65 years, allowing for new services in "virgin" spectrum. The frontier has been defined in the past by the limitations of available technology to generate and receive signals at higher frequencies. I have included in my prepared statement a chart showing how the available spectrum has increased over the years according to the International Telecommunications Union (ITU) tables and how various technical breakthroughs have required pushing those table limits upward.

Now the frontier is at 275,000 mergahertz (in the ITU Radio Regulations), although 40,000 mergahertz is about the present limit of commercially available devices. But even at 30,000 megahertz we are now in a region of the spectrum which has characteristics fundamentally different from those of lower bands: Signals behave like light and do not go around corners, and the signals are more rapidly attenuated than at lower frequencies, due to atmospheric absorption, especially in adverse weather.

Thus we are approaching the end of the frontier for using virgin spectrum for terrestrial broadcasting as we know it. However, because of the vast potential for increased intensity of use, the diminished importance of the frontier does not imply any fundamental "shortage" of spectrum for broadcast or other purposes.

OPPORTUNITIES FOR NEW BROADCAST OUTLETS IN "EXISTING" SPECTRUM

Even though the domestic and international allocation tables are "full" of allocations, there continue to be opportunities for providing new broadcast services within existing spectrum. Examples include the following:

Multipoint Distribution Service (MDS) sharing with Instructional Television Fixed Service (ITFS). This sharing potential, recently approved by the Commission, permits several new channels of television distribution in the microwave spectrum in cities, providing competition to conventional broadcasters and to cable operations.

2. Distribution of television service to cable systems is permitted in the 4,000 megahertz Fixed Satellite Service band. Many homes are equipped to pick up this service directly, although encryption of signals may become more common.

3. Television signals directly to homes are now permitted to be delivered in the 12,000 megahertz Fixed Satellite Service band.

4. In a few years there will be a direct broadcast satellite (DBS) service in the 12,000 megahertz Broadcasting Satellite Service (BSS) band.

5. In 1988 the ITU regulations are expected to permit expansion of the upper limit of the AM broadcasting band from the present 1605 kilohertz to 1705 kilohertz, providing the opportunity for an increase of perhaps 9 percent in the number of AM stations in the U.S. The exact number will be determined in conferences among nations of the western hemisphere, beginning in 1986.

Introduction of these broadcast and broadcast-like services does, of course, reduct the spectrum available for non-broadcast services. But the non-broadcast users also come to the Commission with legitimate requests for more spectrum. In fact, some of these users have their eyes on broadcast spectrum. For example, the Sheriff of Los Angeles County has proposed a long-term transfer of some spectrum from UHF television broadcasting to public safety and other land mobile uses.

But then again those other services also have technical options that could effectively increase their own spectrum capacity. I have already mentioned the existence of new narrow band technologies such as ACSB. Digital technology brings the opportunity of entirely different and possibly much more spectrum efficient ways of transmitting and controlling information in the land mobile and other services. As I have already mentioned, trunking techniques offer significant improvements in spectrum use efficiency where several channels can be shared among several users.

NON-BROADCAST ALTERNATIVES

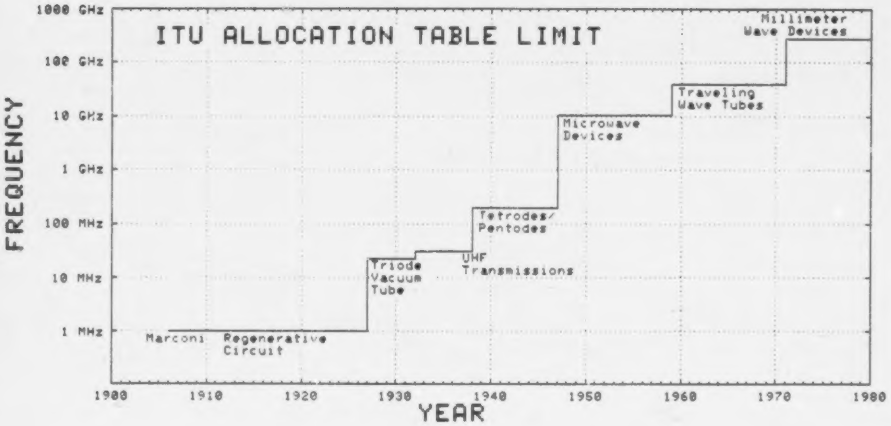
A wide variety of non-spectrum-using but broadcast-like services is becoming available. The spread of such non-spectrum and therefore generally non-regulated technologies tends to fill in a gap in the continuum of information and entertainment services ranging from print media to broadcasting. Previous witnesses before this Committee have well noted the blurring of the distinction between purely broadcast and non-broadcast services. They have noted Teletext, an information service carried by television broadcast signals; Videotex, a service providing somewhat similar functions but carried on wire lines; electronic data base and other communication services to be provided by newspapers and other entities usually thought of as print oriented; video disks; and video cassette recorders, which have reched about 10 percent penetration in the U.S. but about 33 percent in Great Britain where television service is less varied than it is here.

CATV cables now pass about 60 percent of all U.S. television homes. About 35 to 39 percent of television households—about 29 to 32 million—now actually subscribe to CATV. Cable television systems now offer as many as 30 to 50 channels. But 100 or more channels are or will in the near future be available, if there really is consumer demand. Cable television technology not only offers a large number of channels, but it is clear that divided control of program material on the channels is feasible. Thus the large number of channels could in fact as well as in theory offer a wide variety of voices providing information.

Fiber optics technology has often been mentioned as a medium of special interest because of the capacity of the fiber to carry huge quantities of information. That potential is moving towards reality in Elie, Manitoba, where an experiment in using fiber to provide combined local telephone and television service is under way. In Elie there is a dedicated fiber pair from various centers, or nodes, to each home. The fiber pair carries the telephone service and two television channels. Each home can be served simultaneously by two television channels selected from the hundreds available at the central node. Thus, there is essentially an unlimited information capacity potentially available. There are similar experiments being undertaken in the U.K., Germany, Japan, and France.

Taken together, the whole collection of media—from purely print media to Videotex and Teletext to aural and video broadcast media—can provide an enormous number of potential sources for entertainment and information. I see no fundamental technical limitation to the provision of those services. As those services proliferate in response to market demands it will indeed get harder to define sharp distinctions between broadcasting, where content controls have been exercised, and non-broadcast delivery systems where similar content controls have not been imposed. The judgment as to whether the variety of information sources is "enough" to mitigate concerns about broadcaster domination of information pathways and opinion-making is obviously not to be made by the technologist but through the political process. However, it does seem fair for a technologist to assert that there is essentially no technological limit to the number of information sources which can be controlled by different entities. In particular, the radio frequency spectrum does not impose any fundamental limit to the potential for providing information and entertainment services to homes and business establishments.

There is, to be sure, a perceived need for more spectrum capacity than we are using today, for broadcast as well as non-broadcast services. Therefore, there is pressure for all users of the spectrum to move to ever higher frequencies where that is feasible; to make ever more intensive use of "existing" spectrum; and to utilize non-spectrum alternatives where possible. There is no shortage of ways to move on all three of those fronts. In the particular case of information services to the public, there is a wide variety of technical alternatives, both spectrum and non-spectrum, to increase the number of such services, if the services themselves are economically supportable in the marketplace.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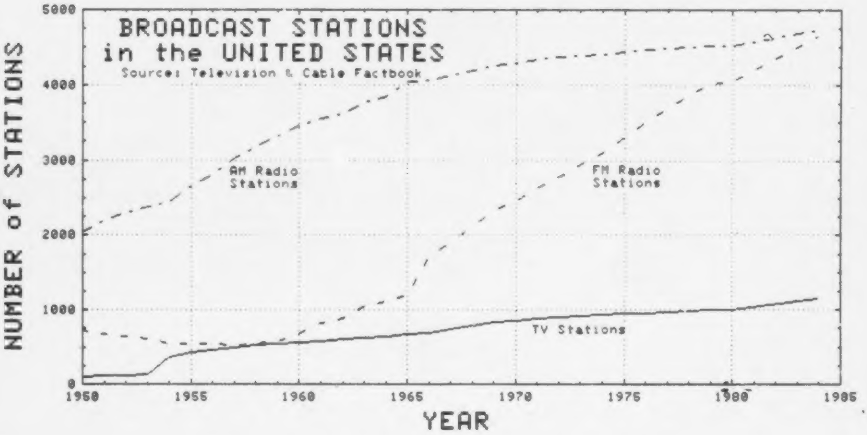
BROADCAST STATIONS in the UNITED STATES
Source: Television & Cable Factbook
NUMBER of STATIONS
5000
4000
3000
2000
1000
0
AM Radio Stations
FM Radio Stations
TV Stations
1950
1955
1960
1965
1970
1975
1980
1985
YEAR

The **Chairman**. Now we'll go to Charles S. Rowe, editor and publisher of the Free Lance-Star in Fredericksburg, who will be representing the American Newspaper Publishers Association.

Good morning. Go right ahead, sir.

STATEMENT OF CHARLES S. ROWE, EDITOR AND COPUBLISHER, THE FREE LANCE-STAR, FREDERICKSBURG, VA., REPRESENTING THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

Mr. **Rowe**. I am pleased to be here today testifying on behalf of the American Newspaper Publishers Association regarding amendments to the Communications Act of 1934.

My name is Charles Rowe and I am editor and copublisher of the Free Lance-Star in Fredericksburg, Va. I represent the American Newspaper Publishers Association, which is a trade association of nearly 1,400 member newspapers throughout North America. Membership accounts for more than 90 percent of U.S. daily and Sunday newspaper circulation, and many nondailies are also members.

Our American society has a great stake in preserving the ideals of a strong, free press, regardless of the sophistication of the technology by which the news is disseminated. Those ideals embody the fundamental principle that the Government shall have no influence over decisions regarding news content or coverage.

The broadcast regulations at issue in S. 1917, the so-called fairness doctrine and equal opportunity rules, are fundamentally at odds with the basic concept of a free press. ANPA supports their repeal. Vigorous public debate and an informed electorate are best achieved through a flow of information completely unrestrained by Government.

As this committee well knows, the means by which news and information are disseminated to the public have undergone extraordinary changes since the adoption of the first amendment. But these developments in communication technology do not alter the nature of these communications or the essential function of a free flow of ideas in a free society.

The freedom from content control which newspapers possess, embodied in the first amendment rights of U.S. citizens and upheld by the Supreme Court, provides the best model for maintaining the free flow concept, regardless of the communications medium used. Whether airwaves, electronic wires or pen and ink are used to transmit information, the content of expression should be free from governmental influence.

ANPA's position opposing content regulation of electronic media recognizes two things. The first is that the current disparities in the regulatory treatment of communications technologies with regard to content are not viable. The second is that content controls constitute a basic threat to the concept of editorial freedom for all media.

The comprehensive regulatory scheme for the broadcast media was developed, in part, on the basis of scarcity. The Government sought to assure a so-called balance in viewpoints because the channels of communication were few.

Today the tremendous competition in the information marketplace, marked by a continuing proliferation of new services, requires that the scarcity doctrine be put to rest. Broadcasters are merely one of many news and information sources, warranting no lesser editorial freedoms than other media. Even the broadcast airwaves are no longer scarce because new technology can now accommodate myriad voices on the spectrum.

Furthermore, the regulatory scheme for broadcasters was developed at a time when the electronic media were clearly divided into broadcast and telephone services. The development of microwave, satellite, computer, cable, and other technologies has blurred the old categories and the bases for their regulation. Broadcasters now compete with a host of other video services such as low-power television, multipoint distribution service, subscription television service, and direct broadcast satellites, all of which are indistinguishable to the consumer.

Telephone wires can deliver video signals, and radio waves can carry digital and voice communications. This evolution in the electronic media negates any need for retaining content controls on the broadcast media. Distinctions between the print and electronic media also are disappearing. Text information can be carried electronically, and indeed many newspapers are engaged in electronic publishing ventures using a variety of transmission media. More than 120 newspaper/cable ventures have been started, and dozens more newspapers are actually pursuing opportunities in this medium.

Existing newspaper/cable services include a wide range of text programing using in most cases the news, financial information, sports scores, and other features currently contained in their printed publications. Low-power television has also attracted a great deal of interest by newspapers either to supplement their print products with electronic publishing services or video productions.

Telephone-based Videotex services offering further opportunities in electronic publishing may become a dominant information medium as the personal computer market expands. Two large newspaper companies, Knight-Ridder and Times-Mirror, have entered partnerships with communications carriers to build a foundation for national Videotex services. Production of the traditional newspaper itself has also undergone significant changes in response to the advances in communications technologies.

Reporters and editors now use complex computer terminals, not typewriters. They can transmit their articles by telephone to computers anywhere in the world with the push of a button. Complete pages are beamed to newspapers nationwide via satellite. Entire newspaper editions are transmitted over microwave signals to remote printing plants, and newspaper libraries can be accessed from home computer terminals.

These advances, while enhancing the economics and efficiency of newspaper operations, in no way alter the role of newspapers in gathering and disseminating news and information to the public. Journalistic freedoms must remain separate and safe from regulations incidental to the techniques of transmission. The existing tension between full press freedom and electronic transmission is most critical with regard to political speech and coverage of public issues. The changes in the information marketplace require the Government to retreat from its intrusions into the editorial process created by section 315.

The purpose of the fairness doctrine is to assure full coverage of controversial issues. Its effect is to inhibit such coverage. The most important public issues are often complex and emotionally charged. The failure to air views about every facet of an issue can generate fairness complaints, regardless of the merits of these complaints or of a broadcaster's efforts to be thorough and fair. Substantial time, effort, and resources must be spent to justify programing decisions to the FCC.

Rather than facilitating penetrating examination of issues, the fairness doctrine makes broadcasters wary of the possible legal risks associated with important stories. Similarly, full evaluation of candidates for public office is impaired by bureaucratic formulas for so-called equal treatment under the equal opportunities provision.

Broadcasters hesitate to provide air time for genuine local candidates because they can't afford to grant air time to everybody who is running. They also want to avoid the legal problems associated with determining who is a legally qualified candidate, what constitutes the use of a station, or how and when lowest unit advertising rates are applied.

The equal opportunity obligations work ironically to silence coverage of the political process.

In conclusion, ANPA believes that the fairness doctrine and equal time rules are untimely, counterproductive public policy. Legislation repealing section 315 is necessary to assure that free press concepts in our society are not undermined by inept, outmoded Government reactions to technological advances in the delivery of information.

Our Constitution reflects a confidence that accuracy and fairness will flourish if the press remains free from Government intrusions into editorial decisions. Congress should reaffirm that confidence.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Rowe.

Mr. Rowe, you said that newspaper Op-Ed pages might not have flourished had newspapers been subject to content controls. Interestingly, of course, the argument is used the other way with radio and television, that the only reason why you will have response time on radio and television is if you have the content controls.

In your judgment, do you have any reason to assume, given free rein, that radio and television would be much different from newspapers in terms of editorials and the equivalent of letters to the editor if they didn't have to worry at the time they initially put on a statement whether or not they may have to give somebody a chance to respond?

Mr. ROWE. I certainly think, Mr. Chairman, that the current requirements have been an inhibiting factor, and that once they are removed, broadcasters without question, I think, would feel much more free to provide public discussion of issues and of candidates. I have seen it happen in the case of a radio station which is affiliated with my newspaper.

I don't get directly involved in a lot of day to day decisions. I encourage the station manager to get involved in more public issue broadcasting, and he always wrings his hands and cites to me the difficulties he is going to have if he runs that radio station like I run the newspaper in the same building.

The CHAIRMAN. And you know, the difficulties are not just theoretical. The cost of defending one of these suits is significant, and to a small radio station it is overwhelming. They simply cannot afford the costs of lawyers and eventually going all the way up to the Supreme Court, let alone just going before the FCC. They simply avoid it.

I am reminded of a case down in West Virginia, involving strip mining. The radio station knew it was a controversial issue, and they knew that the town was split on it, and they didn't know quite what to do about fairness, and they just took the safe route and did not cover it at all.

Well, that case went to the FCC, and it said they had to cover it. It is a significant controversial local issue. So they covered it fairly, they thought. Then they got a complaint under the fairness doctrine that they had not covered it fairly.

Well, no wonder they don't want to cover it under those circumstances. Had they been free to give to it the same judgment you can give to your newspaper they would have covered it from the start, and my hunch is, would have done it with a reasonable degree of objectivity and fairness.

Are there bad apples in the broadcasting business? Of course there are. There are some in the print business, as you are well aware. But are the bulk of them trying to be fair, objective? Sure they are.

Mr. ROWE. I would certainly agree that most of them are trying to be fair and objective, and I think the process can be self-correcting here. If somebody gets too far out of line with regard to a fairness issue, their competitors, both electronic and print, are there to jump on them, and in the long run, out of this I guess what Judge Learned Hand called multiplicity of voices, we could come closer and closer to the truth that Senator Goldwater was referring to this morning.

The CHAIRMAN. And of course the other thing is the assumption that somehow all broadcasters will come down on the same side of an issue. If you look at the market here, with whatever Dr. Powers said, 30 or 40 radio stations, some of whom program classical music and some rock and some talk and some news, the one thing I would be willing to lay money on is that they will not be on the same side of issues.

Whatever the issue may be, they will not be on the same side of it, and you will have an absolute plethora of voices, all to the benefit of the public, I think. Where as now the stations will not air issues at all, pro or con, or the editorials they do now are only marginally controversial. It is understandable why, because they don't want to approach anything that is really controversial.

Mr. ROWE. They are against motherhood and child abuse——

The CHAIRMAN. No; they are for motherhood. I haven't heard any editorials against motherhood.

Mr. Rowe. Pardon me. I meant for motherhood and against child abuse.

The Chairman. However, given a totally free press, you might find one against motherhood and for child abuse, but my hunch is that the others would not opt to go the same way.

Now, what happens? You are in both the newspaper and radio business, and you have cable also?

Mr. Rowe. There is cable in the community. We are not involved in it directly.

The Chairman. All right, some newspapers are and some are not. In your judgment what is going to happen if you want to put your editorials on cable? Maybe you want to buy some time and put them on. Maybe you think it would be a fine way to reach more of the public. Maybe you think there is a justifiable business reason. Are you going to do it if you are going to have to pay the cost for whatever problems those editorials caused, because I'm sure that is what the cable station is going to say to you?

Mr. Rowe. Absolutely not. I would not be interested under those circumstances signing a blank check for legal——

The Chairman. And the cable company will be afraid because they do not know what the rules are.

Mr. Rowe. The rules seem to be very confusing with regard to cable content.

The Chairman. The case I posed earlier about this little daily in southern Illinois, I can see that as the kind of case that will go to the Supreme Court. It is not going to be the Pentagon Papers with the New York Times. It is going to be the small paper in a small area attempting to do what it thinks is right to help expand public knowledge. They will get rapped by some rule by the FCC, and that will be the case, and the court at that stage is going to have to decide which way it is going to go.

As I have indicated, over 2 years ago my initial preference would have been a constitutional amendment guaranteeing to all forms of expression the same privileges that press and speech now have. There were some misgivings about that. I understand why, especially from the print media, for fear that we might go backwards rather than forwards if we open up that box, and I have not done that.

So the next best thing is to at least remove the statutory bases upon which these content doctrines rest, so that there can be no legal interpretation of a statute supporting these doctrines. Can some subsequent Congress reimpose the statutes? Of course. Can some FCC have new regulations based upon those reimposed statutes? They can. It is not as permanent as a constitutional amendment, but it is better than leaving on the books what we have there now.

Mr. Rowe, thank you very much. I appreciate your taking the time to come here today.

Now let us take Mr. William Burleigh, the vice president and general editorial manager of Scripps Howard, who will be testifying this morning on behalf of the American Society of Newspaper Editors.

I say again, from my experience with the print media, the American Society of Newspaper Editors does not always agree with the American Society of Newspaper Publishers on every issue.

STATEMENT OF WILLIAM BURLEIGH, VICE PRESIDENT AND GENERAL EDITORIAL MANAGER, SCRIPPS-HOWARD, ON BEHALF OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, ACCOMPANIED BY RICHARD SCHMIDT, GENERAL COUNSEL

Mr. **Burleigh**. I think that is fair to say, Mr. Chairman.

I am accompanied this morning by Richard Schmidt, who is general counsel of ASNE, and our real expert in first amendment matters.

I appreciate the opportunity to appear before you today on behalf of the American Society of Newspaper Editors. ASNE is the nationwide professional organization of almost 900 people who hold positions as directing editors of daily newspapers throughout the United States.

The society, which was founded over 50 years ago, is dedicated to improving the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The print media in this country, of course, has long enjoyed the basic freedoms set forth in the first amendment to our Constitution. It is so simple and yet so eloquent. "Congress shall make no law abridging the freedom of speech or the press." As Thomas I. Emerson, professor emeritus at Yale Law School, recently recalled when he was honored with the First Amendment Defender Award by Catholic University's Institution for Communication Law Studies, partly as a result of the first amendment and its accompanying body of law, George Orwell's "1984" has not come to pass in the United States.

What has come to pass is an unbelievably rich diversity in this Nation's means of communication. When the first amendment was drafted, the chief form of expression consisted of the printed press or public meetings. They include not only those forms plus radio and television, but now also cable, satellites, microwaves, optical fibers, computers, facsimiles, videotapes, and scores of other devices that could not be glimpsed even by so farsighted a group as our Founding Fathers, yet the essential purpose of the press has stayed remarkably unchanged.

ASNE is committed to the proposition that pursuant to the first amendment, the press has an obligation to provide the citizenry of this country with complete reports of the affairs of government. As was noted in the *Cox Broadcasting* case, "In the society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations."

Throughout our history, this purpose has been enshrined as an integral part of a democratic system. The great Federalist Judge John Marshall, responding to Tallyrand's request that the U.S. Government take measures to curb anti-French publicity in the press, stated:

> Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of our liberty which the government contemplates with awful reference and which would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness is seen and lamented; but the remedy has not yet been discovered.

Yet despite the special historic position afforded the free press, it was not until 1974 that the U.S. Supreme Court in the *Miami Herald* v. *Tornillo*, the case which you cited earlier, Senator, unanimously held as unconstitutional a Florida law granting a right of reply to a political candidate who was as assailed regarding his personal character or official record by any newspaper.

Writing for the Court, Chief Justice Burger noted:

> * * * the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by a government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such compulsion to publish that which "reason" tells them should not be published is unconstitutional. A responsible press is an undoubtedly a desirable goal, but press responsibility is not mandated by the Constitution, and like many other virtues, it cannot be legislated.

In its comment on the Florida law, the Supreme Court noted that if the right of access statute were allowed to stand, "* * * editors might well conclude that the safe course is to avoid controversy." "Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate'."

As all of you are also well aware, in 1969, the same Court in the case of *Red Lion* limited the first amendment rights of broadcasters under the so-called scarcity rationale. When *Red Lion* was decided, there were 6,581 radio stations and 854 television stations licensed in the United States. As of June 30 last year, there were 4,720 AM broadcasting stations alone, 3,441 commercial FM stations, and 844 commercial television stations. In addition, there were 1,091 FM educational radio stations, 172 educational UHF TV stations, and 111 VHF stations. That figures out to an addition of some 3,000 outlets of communication. This is not to mention the proliferation of low-power television and direct broadcasting satelites, the growth of cable television, multipoint distribution service, and other new technologies which are being made rapidly available to more and more consumers.

The technological revolution has clearly knocked the props from under the scarcity argument. Millions of American homes now have the ability to receive material which is electronically published. With the emergence of electronic publishing, it becomes increasingly difficult for regulators to distinguish between print and broadcast journalism.

It is the position of the American Society of Newspaper Editors that the fact that something is transmitted electronically does not change the basic nature of its content from one that was transmitted by print. Consider this hypothetical case, which you touched upon earlier, Senator, in order to grasp the dangers to our historic freedoms wrapped up in this question.

What if a newspaper with pages written and made up in New York were beamed by satellite, an unregulated common carrier, to local cable distributors perhaps franchised as common carriers with extensive coverage of one candidate in a Federal election but not of his rival, clearly covered in broadcasting by the equal time rule. Could the underexposed candidate legitimately demand equal time of the newspaper? Is it easy, as Richard Neustadt reminded a recent conference on this subject, to dismiss the candidate's hypothetical complaint as absurd on its face.

But read the law. It isn't at all clear.

By resolution of its board of directors, the American Society of Newspaper Editors has called for the extension of full first amendment rights to all forms of media. It is the sincere belief of ASNE that the increasing numbers of media voices will insure the public's ability to be addressed, in the words of Judge Learned Hand, by a multitude of tongues.

That wise professor of the Massachusetts Institute of Technology, Professor Pool, whom you cited earlier, offers sound advice in this regard. In reforming meliorism applied to problems created by technological change, the impulse, he observed, is to license and regulate the flow of information as it is born. It takes courage to permit technological change without government shelter.

Rather than seeking to assure balance, fairness, and access in the media through government intervention and regulation, the public policy should be aimed at removing regulatory impediments to the growth and operation of all facets of the media, allowing each to compete with the others in both an economic and an information sense. This is clearly America's first amendment tradition.

Professor Emerson from Yale believes that two aspects of the new technology are of paramount importance for the future of the first amendment. One concerns the breakdown of traditional differences in first amendment law between print and electronics. The other is the potential for wider access by diverse individuals and groups to the mass media.

"On the face of it," he says, "it would appear that the grounds for invoking first amendment electronic law—the scarcity of physical facilities for communication—will largely disappear as a consequence of the new technology. If this be true, then first amendment principles would certainly restrict governmental intervention in the system as to matters of engineering and measures to limit monopoly."

As Professor Emerson recognizes, the new technology creates virtually unlimited access to the means of communication. However, he further recognizes that the increased exercise of first amendment rights will not come about automatically, and that positive steps to achieve the result will have to be taken.

It is in recognition of this need as set forth in Senate bill 1917 that ASNE supports legislation intended to remove the statutory basis for the so-called fairness doctrine and other restrictions on the freedom of the electronic press.

As you, Senator Packwood, said upon introduction of this bill last October. "The public is best served when there is a free flow of diverse ideas. The public is badly served when the Government prohibits the free flow of diverse ideas."

It is our view that all media are entitled to first amendment protection. A first amendment robust enough for the age of electronification must indeed be a seamless garment.

Thank you.

The **Chairman**. The hypothetical that you propose it is not very hypothetical any more. The use of satellites and local cable is happening now.

I think what would happen under the present law is that cable would quit carrying your columns. They are not going to get themselves into a hassle with the FCC if you happen to send out a column about Jesse Jackson or Gary Hart and does not mention all of the other candidates equally.

Now, that clearly is not benefitting the public when cable refuses to carry any of it for fear of legal hassels, and that is basically the situation you have now.

Does Scripps-Howard own broadcast properties?

Mr. **Burleigh**. It sure does.

The **Chairman**. In your experience was the statement of Mr. Sittrick and the testimony of Mr. Morton about the relative cost of properties accurate? This is roughly what they say: In any given market, assuming you have a successful newspaper, to purchase the newspaper will probably cost more than to purchase the successful radio station or the successful television station.

Mr. **Burleigh**. From my limited knowledge I am sure that is correct.

The **Chairman**. And if you mean economic scarcity, daily newspapers are scarce, not radio and television stations. If you have a given amount of money and you want to reach people in the community, you can more easily by a radio station or a television station than you can by the newspaper.

Mr. **Burleigh**. That is correct. But, of course, as I think the number of newspapers has decreased, you find newspapers being more open to points of view than was historically the case in the days of the partisan press where it carried only its own political coloration and nothing else.

The **Chairman**. Those were in the days when the press was extremely limited. There was not a handful—eight dailies at the time of the drafting of the constitution. I think Dr. Smith said 26 weeklies. So even though they were scarce then, in no way were they unbiased. It was indeed a very biased press, deliberately so.

Mr. **Burleigh**. I think you can make a good historic case for the press being less biased and more fair today than at any time in our history.

The **Chairman**. Having read some of the publications prior to the time of the adoption of the Constitution and having read some more on the issue of slavery just prior to the election of Lincoln, there is no question there is not a paper today—not the National Enquirer, not any paper—that can hold a candle to some of the vitriolic statements that appeared in some of our earlier papers. It was clearly known to our founders.

Well, I have no more questions, Mr. Burleigh. I can tell you how much I appreciate having the American Society of Newspaper Editors testify in favor of this. If this legislation is going to pass, it is imperative that a broad spectrum of credible organizations support it, and indeed they do.

As I indicated earlier, any group that wants to testify in opposition we will let testify. What I have found so far is that the opponents are either groups that are quite liberal or quite conservative joining hands in this case, or groups that have a particular religious or ethnic concern who want to testify. But so far, the broad center of this country—publishers, editors, broadcasters, cable, teachers, professional journalists—all have said the time has come to remove what some of them question ever needed to be to begin with. They certainly can find no justification for it now.

Mr. BURLEIGH. Let me assure you that you will find every coloration of opinion among the editors I represent.

The CHAIRMAN. I find that interesting. When I say the American Society of Newspaper Editors supports the bill, I realize it is an organizational support, and you will have some editors who do not agree. But there are some broadcasters who do not agree with this position, and I understand why.

To the extent that you have the protection of the fairness doctrine, you can use it as a cover for avoiding controversial issues. There are some broadcasters who are perfectly happy with their programing and would just as soon not be involved in anything controversial. And it is easier to say that the Government will not let me do it than to say I do not want to do it.

Thank you very much. I appreciate it.

Mr. BURLEIGH. Thank you.

[The statement follows:]

STATEMENT OF WILLIAM BURLEIGH, VICE-PRESIDENT AND GENERAL EDITORIAL MANAGER, SCRIPPS-HOWARD NEWSPAPERS

Mr. Chairman, members of the committee, I appreciate the opportunity to appear before you today on behalf of the of the American Society of Newspaper Editors.

ASNE is a nation-wide professional organization of almost 900 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

ASNE is committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of this country with complete reports of the affairs of Government—be they executive, legislative, or judicial. For "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491 (1975).

The print media in this country has long enjoyed the basic freedom as set forth in the First Amendment to our Constitution, which states so simply and so eloquently, "Congress shall make no law. . . abridging the freedom of speech or the press."

As Thomas Jefferson commented in a letter to Edward Carrington, "the basis of our government being the opinion of the people, the very first object would be to keep that right [of free press]; and were it left to me to decide whether we should have a government without newspapers or newspapers without government, I should not hesitate a moment to prefer the latter."

The view of the importance of the liberty of the press was not unique to Thomas Jefferson and his republican friends. Federalist John Marshall, responding to Talleyrand's request that the United States government take measures to curb anti-French publicity in the press, stated:

"The genius of the Constitution and the opinions of the people of the United States cannot be overruled by those who administer the government. Among those principles deemed sacred in America; among those sacred rights considered as forming the bulwark of their liberty, which the government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps it is evil and inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America. No regulations exist which enable the government to suppress whatever calumnies or invectives any individual may choose to offer to the public eye; or to publish such calumnies and invectives otherwise than by a legal prosecution in courts which alike are open to all who consider themselves as injured."

However, with all of these strong statements concerning a free press it was not until 1974 that the Supreme Court of the United States, in *Miami Herald* v. *Tornillo,* 418 U.S. 241, unanimously ruled that a Florida statute which granted a "right of reply" to a candidate for nomimation for election who was assailed regarding his personal character or official record by any newspaper was unconstitutional. Chief Justice Burger, writing for the Court, stated:

"We see that beginnning with Associated Press, supra, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which 'reason' tells them should not be published is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues, it cannot be legislated."

It is interesting to note that the Supreme Court of the United States, in its comment on the Florida statute, stated:

"Faced with the penalties that would accrue to any newspaper which published news or commentary arguably within the reach of the right-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate'." *New York Company* v. *Sullivan,* 376 U.S. at 279.

The Court also cited its previous opinion of 1966, *Mills* v. *Alabama,* 384 U.S. 214, 218, stating:

"There is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course included discussion of candidates . . ."

As all of you are aware, in 1969 the Supreme Court in the case of *Red Lion Broadcasting* v. *FCC,* 395 U.S. 367, limited the First Amendment rights of broadcasters under the so-called "scarcity rationale". The Court held that due to the scarcity of broadcast frequencies, "government is permitted to put restraint on licensees in favor of others whose views should be expressed in this unique medium. . . It is the right of viewers and listeners, not the right of broadcasters, which is paramount."

As of June 30, 1983, there were 4,720 AM broadcast stations, 3,441 commercial FM stations, and 844 television stations. There were also 1,091 FM educational radio stations, 172 educational UHF TV stations, and 111 VHF TV stations.

ASNE is also aware of the proliferations of Low Power Television and Direct Broadcast Satellites, the growth of cable television, Multi-Point Distribution Service (MDS), and other new technologies which are presently available to consumers and are rapidly becoming available to even more. Millions of American homes now have the availability to receive material which is "electronically published". With this emergence of "electronic publishing", it becomes increasingly difficult for regulators to distinguish between print and broadcast journalism. ASNE submits that the fact that something is transmitted electronically does not change the basic nature of its content from when it was transmitted by print.

ASNE has by resolution of its Board of Directors called for the extension of full First Amendment rights to all forms of media.

It is the sincere belief of the American Society of Newspaper Editors that the increasing numbers of media "voices" will ensure the public's ability to be addressed, in the words of Judge Learned Hand, by a "multitude of tongues".

Recently Thomas I. Emerson, Professor Emeritus at Yale Law School, was awarded the First Amendment Defender award by Catholic University of American Law School's Institute for Communication Law Studies. Recognized as a leading authority on the First Amendment and often cited in Supreme Court opinions, Professor Emerson in his acceptance address stated:

"When the First Amendment became a part of the Constitution in 1791, the scope and implications of that provision were by no means clear. Its fundamental purpose was to support the principles of an open and self-governing society. More specifically, it was intended to protect speakers who criticized the government, to forbid censorship of the press, and to permit assemblies in the public halls or demonstrations in the streets.

Professor Emerson goes on to state:

"Partly as a result of the First Amendment and its accompanying body of law, George Orwell's '1984' has not come to pass in the United States.

"When the First Amendment was drafted at the end of the eighteenth century, the chief form of expression consisted of the printed press, meetings, demonstrations, and the like. During the course of this country radio and television came to play a prominent role. At the present time the system of freedom of expression has been revolutionized by the development of radically new modes of communication. These include cable television, satellites, microwaves, optical fibers, computers, facsimiles, video tapes, and many similar devices. Two aspects of this new technology are of paramount importance for the future of the First Amendment. One concerns the breakdown of traditional differences in First Amendment law between the print media and the electronic media. The other is the potential for wider access, by diverse individuals and groups, to the mass media.

"As First Amendment law has developed there has emerged a significant difference in the degree of governmental control allowed over the traditional print media and the newer electronic media. The older forms of communication enjoy, at least in theory, a somewhat higher degree of protection from governmental interference. Restrictions upon the content of communication, with some exceptions for libel, obscenity, advocacy of law violation and the like, are forbidden. Time, place, and manner of control are limited, by and large, to those necessary to provide physical accommodation for competing interests. Special procedural doctrines, such as the rule against prior restraint, are applied with some degree of firmness. All in all, the print media are constitutionally well entrenched.

"The same does not apply, at least to the same degree, to the electronic-media . . ."

He went on to state: "One impact of the revolution in technology is the merging of the print and electronic modes of communication."

He further states: "On the face of it, however, it would appear that the grounds for invoking First Amendment electronic law—the scarcity of physical facilities for communication—will largely disappear as a consequence of the new technology. If this be true, then First Amendment principles would certainly restrict governmental intervention in the system as to matters of engineering and measures to limit monopoly."

As Professor Emerson recognized, the new technology creates virtually unlimited access to the means of communication. He further recognizes that the increased exercise of First Amendment rights will not come about automatically and that positive steps to achieve that result will have to be taken.

It is with a recognition of this concept as set forth in S. 1917 that ASNE supports legislation intended to remove the statutory basis for the so-called Fairness Doctrine and other restrictions on the freedom of the electronic press. We do not comment on other provisions of the Bill.

As you, Senator Packwood, said upon introduction of this bill on October 3, 1983: "The public is best served when there is a free flow of diverse ideas. The public is badly served when the government prohibits the free flow of badly served when the government prohibits the free flow of diverse ideas."

Again, to quote Thomas Jefferson, "our liberty depends in freedom of the press, and that cannot be limited without being lost."

It is our view that all media are entitled to First Amendment protections.

The **Chairman**. Now we will hear from Mr. Robert Lewis, representing the Society of Professional Journalists, more commonly known to the public as Sigma Delta Chi.

Good morning. Good to see you again.

STATEMENT OF ROBERT LEWIS, ON BEHALF OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, ACCOMPANIED BY BRUCE W. SANFORD, COUNSEL

Mr. **Lewis**. Thank you, Mr. Chairman, for providing this opportunity to comment on your bill which would eliminate the artificial distinction that now exists between the first amendment rights of broadcast and print journalists.

My name is Bob Lewis. Accompanying me is Bruce W. Sanford of Baker & Hostetler, the first amendment counsel for the Society of Professional Journalists, Sigma Delta Chi.

I have been a working reporter, first in my home State of Michigan and then here in Washington as a correspondent for Newhouse newspapers, for the past 28 years. In addition, due to my professional interest in this issue, I am national secretary of the Society of Professional Journalists and was 6 years chairman of its Freedom of Information Committee.

The society, formed in 1909, is the largest organization of journalists in the United States and represents the views of both broadcast and print journalists. On behalf of its 24,000 members, the society has for a number of years opposed the effects of section 312(a)(7) and section 315 of the Communications Act of 1934 on the content of broadcast news programing. In fact, at our national convention in San Francisco last fall, the society passed a resolution, which I have attached to my statement, urging the repeal of the fairness doctrine.

Mr. Chairman, in the interest of brevity, I would like to offer this statement for the record, and I will just highlight several points in it.

The CHAIRMAN. The statement will be in the record in full.

Mr. LEWIS. Mr. Chairman, you are to be applauded for your persistent efforts to end Government regulation of the content of radio and television programing. The society supports you in this effort.

We believe that the time has long since come to extend the first amendment's guarantee of our free press to broadcast journalism. The first amendment does not distinguish between broadcast and newspaper journalists, yet broadcasters have long been denied the same free press rights as their counterparts in the print media.

And in the last analysis, this lack of freedom is really most detrimental to the American public. As working journalists, we have no doubt that a government-imposed regulation of broadcast content stifles debate and prevents the American people from being fully informed.

Attempts to insure that news and public affairs programing are fair or objective strike at the heart of the public interest and at an active press engaged in information collection and dissemination. As Walter Cronkite has observed, "Broadcast news today is not free. Because it is operated by an industry that is beholden to the government for its right to exist, its freedom has been curtailed by fiat, by assumption and by intimidation and harassment."

Even the most basic premise underlying government regulation of broadcasting—the scarcity of available broadcast frequencies—is no longer valid. This committee received testimony in the 97th Congress, as it did from previous witnesses today, that technological advances have rendered this rationale obsolete.

It is also a fact that today in the United States there are far more broadcast outlets than newspapers. This recent communications revolution should convince Congress, the Federal Communications Commission, and most importantly, the American people, that freeing broadcasters from their Government shackles would increase the outlets for diverse points of view in public debate.

The governmental regulation of broadcasters, as manifested in the fairness doctrine and personal attack and editorializing rules, has a tremendous effect on the content of information broadcast.

Furthermore the society urges this committee to explore the effect of these regulations on the technological advances that will soon allow even newspapers to be transmitted electronically. Within a decade or two, we are told, all communications may be by electronic means. Newspapers as we know them could be a thing of the past. So the question is raised: Do the laws we discuss today mean that newspapers distributed electronically will come under regulation by the government? We fear they might, and this provides an even greater impetus to amend the Communications Act of 1934, as you did in S. 1917.

We believe that the fairness doctrine does not encourage robust debate; it stifles it. Under this doctrine, broadcasters are required to afford reasonable opportunities for the broadcast of opposing viewpoints. Now that may sound fine in theory, but after years of experience, there can be no doubt that the fairness doctrine has failed in practice to stimulate free expression of diverse ideas. And the bottom line is that the fairness doctrine gives the Government the ability to manipulate the requirements of fairness and balance as a means of penalizing disfavored broadcasters.

Under current law the Government can, and often does, determine the issues raised in a particular broadcast, whether they constitute controversial issues of public importance and whether the broadcaster's presentation has been balanced.

This invitation to abuse by the Government is incompatible, we feel, with the first amendment. The media, whether broadcast or print, must be free to tell the truth as it sees it without the threat of Government interference. By requiring fairness and balance in all news and public affairs programing, the doctrine substitutes the Federal Communications Commission as a kind of supereditor for the journalist. Intervention by the Commission in the name of fairness is in direct contravention with the principle of editorial freedom embodied in the first amendment.

A licensee who does not seek controversy and who sticks to bland, nonissue-oriented programing is safe, while the broadcaster who presents controversy is apt to be stripped of his license or at least faced with the threat of high legal fees to defend himself before the Federal Communications Commission.

I think it is unfortunate, Mr. Chairman, that something with the nice-sounding name of the fairness doctrine has been imposed on the broadcast media of this country for some half a century. To be against the fairness doctrine almost makes one think that he is going to be in favor of being unfair, and that is certainly not the case.

I would like to submit a copy of the society's ethics code which among many, many other provisions calls for fairness, and objectivity in news coverage. This is the code that is voluntarily subscribed to by both our members and many journalists who are not members of the society.

I think it is reasonable to ask the question: If the fairness doctrine is repealed, what would keep broadcasters fair? I think the answer to that is that these very same forces moving newspapers and print journalists to be fair, to seek objectivity and to balance coverage would also come into play in the broadcast area. After all, we are all in a very competitive marketplace. I do not think there is much of a market for subjective, biased, prejudiced, slanted reporting whether it be broadcast or print. The market will dictate fairness, if nothing else.

I also realize that as a reporter in Washington for a number of years covering the political process that this is a very controversial proposal. Members of Congress who have been in public life and who deal with the press on a daily basis frequently express opposition to removing what they see as a protection for people in public life. And as in all political processes, I think you may have to look for some kind of middle ground, a compromise ground.

We are in favor of repeal of the fairness doctrine. We also realize that there may be some compromise that may have to be accepted short of full repeal. One obvious compromise would be a trial. Obviously, if the fairness doctrine is repealed, a future Congress can reimpose it. But if the fairness doctrine were set aside for a 2-, 3-, 4-year period in which we could all—all the American people and Congress—see how broadcasters operate without this kind of restraint, we could see whether there are problems that are not foreseen. That may be one way of getting the support you need to pass this legislation.

In view of this counterproductive experience with Government regulation of broadcast content and in the name of fairness, the Society of Professional Journalists concludes that now is the time to reaffirm the central meaning of the first amendment—in other words, to reaffirm, as the Supreme Court said in *New York Times* v. *Sullivan*, "a profound national commitment to the principles that debate on public issues should be uninhibited, robust, and wide open."

We urge Congress to pass S. 1917. Now is the time to get Government off the back of the first amendment and thereby insure that the first amendment means the same thing for newscasters as for newspapers. The public deserves the same benefits of a free press when it listens to the news as when it reads the news.

The CHAIRMAN. I can understand why an incumbent would not want to change the present rules. First, if we are going to allow radio and television to attack us the way newspapers do editorially on occasion, we probably will not like that. At the moment they maybe reluctant to do so because they are stuck with the fairness doctrine.

As far as the equal time rules are concerned, clearly they benefit the incumbent. We are newsworthy, so radio and television can cover us in their news programs. That does not count for equal time. But if we appear on something other than a news event, then they have to give all of our opponents equal time. There normally is not just one opponent any longer; you will have a couple of libertarian or other candidates, plus a write-in candidate and maybe two or three other minor candidates, and you have to give them all equal time.

Well, the natural tendency under those circumstances is to do nothing, which is clearly to the benefit of the incumbent. We normally are more newsworthy and therefore get more news coverage, and we normally have more name familiarity than the challengers. So anything that causes a broadcaster not to cover all of us equally is to the benefit of the incumbent.

So I can understand why there might be a political desire not to change these regulations. The present system protects us.

Second, in terms of the public debates, at least before the FCC revised their rules, the argument was well, presidential candidates will get covered, and they will have debates because they will be sponsored by the League of Women Voters or Rotary, or whoever may sponsor them, and they can be covered as a news event. And that is, therefore, not covered by equal time.

I am more really concerned about the races for auditor, and sheriff, and county commissioner, and city council, where you have infinitely more candidates running than you do running for President or running for the Senate. However, in the State of Washington recently when Senator Evans was in the primary and up for reelection, there were 31 canididates—I cannot recall whether there were 13 Republicans and 18 Democrats seeking the nomination or the other way around.

Now, what station in its right mind is going to sponsor a debate with 31 candidates, of whom only 4 or 5 by any news judgment had any viability as candidates? And that is roughly the way the print press covered them. You had Senator Evans and his principal Democratic challenger who were newsworthy. You had a couple of others who were possibly newsworthy, and the rest were more or less given slight coverage, based upon their position.

But in the broadcast realm, from the standpoint of any kind of coverage other than news coverage, they just do not cover them. You are not going to have a debate with seven candidates for sheriff, of whom only two or three are viable candidates, or for auditor. The equal time rule does not help the public at all. What it does is keep any of the candidates off of radio-sponsored debates or television-sponsored debates. Your only alternative is, therefore, if you are a radio broadcaster, to go to the candidates' fair, and I can understand why they are not covered.

First, they start with the lower ranked candidates and work up to the higher ranked candidates in hopes of holding the audience. By the time they get to the higher ranked candidates it is 11 or 11:30 at night, and as each succeeding wave of candidates finishes, they and their supporters leave, until you are left with the sponsoring organization and the candidates, the campaign managers and family. If you are going to cover all of that live, you are out of your mind.

So from a news standpoint or an equal time standpoint—the last way you attempt to cover local races is to decide you will give all of the candidates 3 or 5 minutes to do an ad. Sometimes the stations will even pay the production costs of the ad. Then they will run them all back to back to back to back to back to back on Sunday at 8 or 9 at night until you are bleary from looking at the succession of public service ads a the local television station, and the public again pays no attention.

For the life of me I cannot find any value in the equal time rules or the fairness doctrine or most of the other content doctrines we have, on how the public is protected.

Mr. LEWIS. There is a scarcity factor in this issue, and what is scarce is prime time; and because of that broadcasters have to exercise editorial judgment on how to—who are the major candidates, what candidates shall be taken seriously, what candidates are running for other reasons.

And as you have just so well pointed out, the equal time provision works to disallow the broadcaster to exercise that kind of editorial judgment that we in the print press do every day.

The CHAIRMAN. I'm not sure but I would wager that several of the networks, if not all of them, are faced with problems even now about equal time in terms of their coverage of the eight principal Democratic candidates, because there is, again, a multitude of candidates seeking the Democratic nomination who have filed in New Hampshire but are not being covered. And I will bet you anything there are at least some complaints by those candidates. Yet again, by any rational stretch of the imagination, you in the print press do not regard them as serious candidates. You cannot find their names very often in your columns.

So, again, I try to think to myself how is the public benefited? Do they get more news because of this? They do not. They get less news than they otherwise would get because of the doctrines.

Do they get more serious editorials and coverage of controversial issues from the television stations than they would otherwise get? No; they get less serious ones and routine ones, the motherhood and child abuse ones. Perhaps if a station is really daring, one involving traffic signals. But if you mean are they going to editorialize on Lebanon or El Salvador, very, very seldom.

I have no more questions. I appreciate very much your waiting this long to testify.

Mr. LEWIS. Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF ROBERT LEWIS, NATIONAL SECRETARY, ON BEHALF OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

Thank you, Mr. Chairman and members of the committee for providing this opportunity to comment on this bill which would eliminate the artificial distinction that now exists between the First Amendment rights of broadcast and print journalists.

My name is Bob Lewis. Accompanying me here today is Bruce W. Sanford of Baker & Hostetler, the First Amendment Counsel of the Society of Professional Journalists, Sigma Delta Chi. I have been a working reporter, first in my home state of Michigan and then here in Washington, for the past 28 years. In addition to my professional interest in this subject, I am National Secretary of the Society of Professional Journalists and was for six years chairman of its Freedom of Information Committee. The Society, formed in 1909, is the largest organization of journalists in the United States and represents the views of both broadcast and print journalists. The Society, on behalf of its 24,000 members, has long opposed the deliterious effects of Section 312(a)(7) and 315 of the Communications Act of 1934 on the content of broadcast news programming. In fact, the SPJ, SDX national convention in San Francisco last November passed a resolution, which I have attached, urging repeal of the Fairness Doctrine.

Mr. Chairman, you are to be applauded for your persistent efforts to end government regulation of the content of radio and television programming. The Society supports you in this effort. We believe that the time has long since come to extend the First Amendment's guarantee of a free press to broadcast journalists.

The First Amendment does not distinguish between broadcast and newspaper journalists. Yet broadcasters have long been denied the same free press rights as their counterparts in the print media. In the last analysis, this lack of freedom is really most detrimental to the American public. As working journalists, we have no doubt that government-imposed regulation of broadcast content stifles debate and prevents the American people from being fully informed.

Regulation of broadcast content runs against our tradition of distrusting government action in the name of free expression. Attempts to ensure that news and public affairs programs are "fair" or "objective" strike at the heart of the public interest in an active press engaged in information collection and dissemination. As Walter Cronkite has observed: "Broadcast news today is not free. Because it is operated by an industry that is beholden to the government for its right to exist, its freedom has been curtailed by fiat, by assumption, and by intimidation and harassment."

Even the basic premise underlying governmental regulation of broadcasting—the scarcity of available broadcast frequencies—is no longer valid. This committee received conclusive testimony in its hearings during the 97th Congress that technological advances have rendered this rationale obsolete. It is also a fact that today in the United States there are far more broadcast outlets (8,901 radio stations and 1,046 television stations) than newspapers (1,800 daily). This recent communications revolution should convince Congress, the Federal Communications Commission and the American people that freeing broadcasters from their governmental shackles would exponentially increase the outlets for diverse points of view in the public debate.

The governmental regulation of broadcasters, as manifested in the Fairness Doctrine, personal attack and editoralizing rules, all have a tremendous effect on the content of information broadcast. The Society urges this committee to explore the effect of these regulations on the technological advances that will soon allow even newspapers to be transmitted electronically. Within a decade or two, we are told, all communications will be by electronic media. Newspapers as we know them could be a thing of the past. Do the laws we discuss today mean that newspapers distributed electronically will come under regulation by the government? We fear it might, and this provides an even greater impetus to amend the Communications Act of 1934 as provided in S. 1917. Allow me now, Mr. Chairman, to analyze briefly the regulations the Society urges Congress to change.

THE FAIRNESS DOCTRINE

The Society believes that the Fairness Doctrine does not encourage robust debate, it stifles it. Under this Doctrine, broadcasters are required to afford reasonable opportunities for the broadcast of opposing viewpoints. This sounds fine in theory but, after years of experience, there can be no doubt that the Fairness Doctrine has failed in practice to stimulate free expression of diverse ideas. The Commission has implemented the Doctrine by (1) investigating individual fairness complaints alleging the discussion of only one side of an issue of public importance, and (2) reviewing the broadcaster's overall "fairness" performance in license renewal proceedings.

Not infrequently, the FCC has launched detailed investigations into a broadcaster's performance on a specific issue. Even though the broadcaster is often vindicated, the expense of the inquiry can be staggering. Moreover, the FCC has ruled that specific programs did, in fact, violate the Doctrine and has ordered the broadcaster to present an opposing viewpoint. The Commission has twice in recent years imposed its most severe sanction and revoked station licenses for failure to meet fairness obligations.

The bottom line is that the Fairness Doctrine gives the government the ability to manipulate the requirements of "fairness" and "balance" as means of covertly penalizing disfavored broadcasters. Under current law, the government can and often does determine, without procedural constraints, the issues raised in a particular broadcast, whether they constitute controversial issues of public importance, and whether the broadcaster's presentation has been "balanced." This invitation to abuse the discretion left in government is incompatible with the First Amendment. The press, whether broadcast or print, must be free to tell the truth as it sees it without the threat of governmental interference.

The FCC's record of enforcing the Fairness Doctrine is one of arbitrariness. This ability of the Fairness Doctrine to take different substantive forms is also contrary to First Amendment policy. A broadcast journalist is never quite sure when the Commission might decide to alter its method of enforcement, and the government can also manipulate the requirements of the Doctrine to suit its purposes.

The Fairness Doctrine is a direct regulation of broadcast content. By requiring "fairness" and "balance" in all news and public affairs programming, the Doctrine substitutes the Commission for the journalist as a kind of "super-editor." Intervention by the Commission here in the name of fairness is in direct contravention with the principle of editorial freedom embodied in the First Amendment.

As Supreme Court Justice William O. Douglas once wrote: "The fairness doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends."

In an attempt to remove itself from interference in the day-to-day function of editors, the Commission has sought to give broadcasters substantial latitude by making a determination of reasonable "good faith" at license renewal. The Commission has announced that it regards "strict adherence" to the Fairness Doctrine as the single most important requirement of operation in the public interest—"the sine qua non for grant of renewal of license." This process also serves as a substantial deterrent to the exercise of editorial discretion, especially the presentation of controversial information. Because the "good faith" of the broadcaster is often measured by the number of complaints received, the more airtime a broadcaster devotes to controversial issues, the more he is likely to be called to account at license renewal. The landmark WXUR case,[1] the first license revocation ever based on Fairness Doctrine violations, involved a broadcaster who regularly devoted almost the entire broadcast day to the discussion of controversial issues. The lesson of WXUR is certainly antithetical to the goals of the First Amendment: A licensee who does not seek controversy and sticks to bland, non-issue oriented programming is "safe" while the broadcaster who presents controversy is apt to be stripped of his license.

EDITORIALIZING AND PERSONAL ATTACK RULES

Let me now turn, Mr. Chairman, to two outgrowths of the Fairness Doctrine—the Editorializing Rule and the Personal Attack Rule. The Editorializing Rule requires a broadcaster who endorses or opposes a candidate for public office over the airwaves to notify and offer reply time in the same manner. Under the Editorializing Rule, the broadcaster must complete the notification procedure within 24 hours of the broadcast.

Under the Personal Attack Rule, the broadcaster who "attacks" an individual or group during the presentation of a "controversial issue of public importance" must, within one week of the broadcast, notify the person or group of the time and date of the broadcast, furnish a tape or transcript of the attack, and offer the individual or group reasonable opportunity to respond.

Both rules are extremely vague and leave considerable discretion in the hands of government. The personal attack obligation is only triggered during the discussion of "controversial issues of public importance," which is defined in each case by the government. The government retains broad power to determine what constitutes a "personal attack" on a case-by-case basis. A broadcaster who violates the rule is required to provide "reasonable" response time, with "reasonable" being interpreted by the government. It is not difficult to see the potential for arbitrary enforcement inherent in the regulation. The Editorializing Rule is equally vague in its reasonableness requirement. In fact, FCC decisions based on these rules have been arbitrary and afforded broadcast journalist no guidelines on which to premise their actions.

Like the Fairness Doctrine, these rules operate directly on the content of programming. Such a mechanism inherently operates as a limiting influence upon the editorial discretion of the broadcast journalist by forcing him to consider these rules in making programming judgments. In addition, by requiring the broadcaster to relinquish valuable airtime to an outsider, a more serious potential penalty for a disfavored exercise of discretion is exacted.

Ironically, the United States Supreme Court has upheld these rules for broadcasters yet struck down a regulation almost identical to the Personal Attack Rule that affected newspapers.[2] It is time to recognize that there is simply no logical difference between newspaper space and airtime and printing and broadcasting costs in terms of the penalty imposed on the exercise of journalistic discretion.

The ramifications of this chilling effect are a diminution of the amount of programming dealing with controversial issues. If endorsement of a political candidate will lead to an obligation to provide time to all other candidates for the same office, the probability is that there will be no discussion of the merits of any candidate. The result is that a regulation intended to facilitate the discussion of diverse views results instead in the discussion of no views at all. Similarly, if critical discussion of controversial issues leads to an obligation to present opposing spokesmen, broadcasters considering showcasing unorthodox views will be discouraged from doing so.

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[1] See *Brandywine-Main Line Radio* v. *FCC*, 473, F.2d 16 (D.C. Cir.), cert. denied, 412 U.S. 922 (1972).

[2] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974).

CONCLUSION

Allow me to sum up, Mr. Chairman. In view of this counter-productive experience with government regulation of broadcast content in the name of "fairness," the Society of Professional Journalists, Sigma Delta Chi believe that now is the time to reaffirm the "central meaning" of the First Amendment; in other words our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[3] We urge Congress to pass S. 1917. Now is the time to get government off the back of the First Amendment, and thereby ensure that the First Amendment means the same thing for newscasts as for newspapers. The public deserves the same benefits of a free press when it listens to the news as when it reads it.

The **Chairman**. Now we will conclude with a panel representing the Association for Education in Journalism and Mass Communication. As I said earlier, that translates as the deans and the teachers of the schools of Journalism in the United States. We have Dean Richard Cole from the School of Journalism at North Carolina; Prof. Vernon Stone, the director of the School of Journalism at Southern Illinois; Prof. Bill Chamberlain, School of Journalism of the University of North Carolina; and Prof. Willard Rowland.

Do you want to go in that order?

Dean Cole, go right ahead.

STATEMENT OF DEAN RICHARD COLE, SCHOOL OF JOURNALISM, UNIVERSITY OF NORTH CAROLINA (CHAPEL HILL), ON BEHALF OF THE ASSOCIATION FOR EDUCATION IN JOURNALISM AND MASS COMMUNICATIONS, ACCOMPANIED BY PROFESSOR VERNON STONE, DIRECTOR, SCHOOL OF JOURNALISM, SOUTHERN ILLINOIS UNIVERSITY; PROFESSOR BILL CHAMBERLIN, SCHOOL OF JOURNALISM, UNIVERSITY OF NORTH CAROLINA (CHAPEL HILL); AND DR. WILLARD D. ROWLAND, ASSISTANT PROFESSOR OF COMMUNICATIONS, UNIVERSITY OF ILLINOIS

Mr. **Cole**. Good morning.

I am here representing AEJMC because I was its president in 1982-83.

I would like to do two things very briefly: tell you a little about AEJMC and its interest in the Freedom of Expression Act; and present you with a resolution that was passed by our organization at its last convention.

AEJMC is composed of approximately 1,800 professors of journalism and mass communication all across the United States with some members in Canada, Mexico, and several other countries. Without doubt, it is the leading association of professors in our field.

The interests of members range widely: from basic newspaper writing through all of the different mass media institutions themselves, to international communication and many other areas, to quite esoteric research in communication theory and methodology.

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[3] *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Many of our members are keenly interested in mass communication law and in broadcasting regulation, and they have conducted a wealth of research in those areas.

This is the pertinent resolution that was passed at the 66th annual convention of AEJMC at Oregon State University on August 9, 1983.

> Recognizing that the growth and convergence of technologies for the delivery of information do not change the essential nature of communications in a free society, AEJMC reaffirms that the public interest is best served where freedom from content regulation is protected from undue economic, government and social control, regardless of the means by which information is disseminated. AEJMC welcomes the opportunity for its members to work with Congress in developing a comprehensive communication policy that promotes freedom of expression.

That is the official position of AEJMC. That is, we as a scholarly organization support the concept of minimizing any limitations on freedom of expression and in general of extending traditional first amendment rights to all communication media. We have not taken a position on particular provisions of the Freedom of Expression Act now being considered.

Unfortunately, the current AEJMC president, Dr. Everette Dennis, dean of the School of Journalism at the University of Oregon, cannot be here today, but he has written a letter to Senator Packwood about the Freedom of Expression Act.

Three of our members are here today to speak about the proposed legislation. Dr. Vernon Stone, on my right, director of the School of Journalism at Southern Illinois University at Carbondale, is a distinguished researcher. He will speak in favor of the legislation and report some pertinent results of research he has conducted.

Then Dr. Bill Chamberlin will summarize the viewpoints of AEJMC members about the legislation. Dr. Chamberlin is chairman of AEJMC's Committee on Professional Freedom of Responsibility, and he is on the faculty of the School of Journalism at the University of North Carolina at Chapel Hill.

Dr. Willard Rowland, assistant professor of communications at University of Illinois, jointly prepared the testimony that Dr. Chamberlin will deliver.

Thank you.

The CHAIRMAN. Thank you.

Professor Stone.

Mr. STONE. Mr. Chairman, I will summarize my prepared statement.

The Freedom of Expression Act would help bring broadcast regulation up to date, as did a name change, for the old Association for Education in Journalism. It is now the Association for Education in Journalism and Mass Communication.

In education, as I believe it should be with the first amendment, the press means mass media of communication, electronic as well as print. The big question is what is broadcasting.

You mentioned the southern Illinois cable stations. One in particular, Metropolis, Ill., is a city where the weekly newspaper also puts its stories on the cable system, video as well as print, for exactly the same stories. And long before cable television, jointly owned newspapers and radio stations were using carbon copies of each other's news stories for identical content—again, press freedom in one case; Government control in the other.

Even if there were no first amendment problems, content control is no longer needed, if it ever was. It tends to get in the way of the great majority of reporters, editors, and others who are dedicated to fairness and responsibility and content. They have their own fairness doctrine, not a Government regulation, but a professional ethic.

As has been pointed out by Senator Goldwater and others, reporters are also human beings, but content control I believe underestimates education and practice in journalism. Students in our schools of journalism and mass communication are taught ethics and social responsibility in their courses. Most students internalize those values. A survey of our journalism majors at Southern Illinois University last summer found that practically all considered ethics a crucial part of their training. The majority even said that our separate course on mass media ethics should be required rather than elective. I am pleased to see a good turnout of students at this hearing today.

There is evidence of growing professionalism in broadcast journalism. Reporters and others have more education than they did a few years ago. A national survey in 1982 showed that the majority of radio and TV news directors were college graduates. That had not been so when a similar survey was conducted 10 years earlier.

Also indicating greater professionalism, membership in the Radio and Television News Directors Association, the principal organization for better broadcast journalism, has more than doubled in recent years.

Now, as an educator and former working journalist, I am critical of mass media content. I find that local broadcast and print journalists are often sloppy, but almost always they are fair. These broadcast professionals could do a better job without Government surveillance. Controls on content are disfunctional, and they tend to chill the reporting of the controversial. A survey of news directors found that the fairness doctrine was creating problems in the news operations of 25 percent of the TV stations in 1982. That means that in one of every four stations, regulation was more than a chilling presence, it was a problem actually getting in the way of television's efforts to serve the public. Broadcast news directors and others can provide examples.

The concerns that broadcasters might abuse greater freedom if it were given to them have proved unfounded in most cases. The partial deregulation of radio in 1981 permitted stations to cut back on news if they wished, but a national survey a year later found that most radio stations were doing at least as much news as before deregulation. The same survey failed to show any relationship between deregulation and the amount of money that radio stations spent on their news operations. Most cutbacks in radio news, where they occurred, appeared to come from the economy rather than from deregulation.

In closing, I might say that financially, broadcast news is in good health, and that is another reason it does not need content regulation. In the early days of TV news, news was a public service but a financial loser at most stations. Now, as the survey data show, news pays its way at practically all TV stations and two-thirds of the radio stations around the country. From the start, news has sold newspapers. Now it is also the big moneymaker in local television and much of radio.

The public has developed an appetite for TV and radio news, and they operate in a competitive marketplace. As Senator Goldwater noted, when a station fails to serve the public, audiences can activate a self-correcting process with the touch of a dial, and when audiences speak, advertisers listen.

Content control of the electronic media of communication underestimates broadcasters, the public and the free marketplace.

Thank you.

[The statement follows:]

STATEMENT OF VERNON A. STONE, DIRECTOR, SCHOOL OF JOURNALISM, SOUTHERN ILLINOIS UNIVERSITY, ON BEHALF OF THE ASSOCIATION FOR EDUCATION IN JOURNALISM AND MASS COMMUNICATION

The Freedom of Expression Act would help bring broadcast regulation up to date, as did a name change for the old Association for Education in Journalism, which is now the Association for Education in Journalism and Mass Communication. In education, as it should be with the First Amendment, the press today means the mass media of communication, electronic as well as print. A Communications Act which denies First Amendment protection to television and radio is as out of date as a school that still teaches only newspaper journalism.

The convergence of technologies for the delivery of information has blurred old distinctions. For example, in Metropolis, Ill., the weekly newspaper also puts its stories on a cable channel. Many other cable systems show newspaper stories as video. And long before cable television, jointly owned newspapers and radio stations were using each other's carbon copies of news stories. For identical content, there's press freedom in one case and government control in the other.

The First Amendment provides sufficient basis for S. 1917. But even if there were no constitutional problem, content control of broadcasting has outlived any need there may once have been. Today it only tends to get in the way of that great majority of reporters, editors and others who are dedicated to fairness and responsibility in content. They have their own fairness doctrine, not a government regulation but a professional ethic.

Students in schools of journalism and mass communication and in the sometimes separate departments of radio-television are exposed to matters of ethics and social responsibility in a number of courses. Most students internalize those values. A survey of journalism majors at Southern Illinois University last summer found that they consider ethics a crucial part of their training. The majority even said that the school's separate course on mass media ethics should be required rather than elective. That high regard for ethics and responsibie communication will be carried to their jobs.

There is evidence of growing professionalism in broadcast journalism. Reporters and others have more education than a few years ago. A national survey which I conducted in 1982 showed that the majority of radio and TV news directors were college graduates. That had not been so when I did a similar survey 10 years earlier. (In 1982, 76 percent of the TV news directors and 56 percent of the radio news directors held college degrees, compared to 57 percent of the TV and 38 percent of the radio news directors surveyed in 1972. See: Vernon A. Stone, "Then and New", RTNDA Communicator, Vol. 37, October 1983, pp. 28-30.) Also indicating greater professionalism, membership in the Radio-Television News Directors Association, the principal organization for better broadcast journalism, has more than doubled in recent years.

As an educator and former working journalist, I am critical of mass media content. I find that local broadcast and print journalists are often a sloppy but almost always fair. For example, I am annoyed when a reporter for a local TV station consistently refers to Kentucky Governor Martha Layne Collins in subsequent reference as "Mrs." Collins, not "Governor" Collins or just "the governor", as was done for John Young Brown. But to the station's credit, its coverage of last year's gubernatorial campaign in Kentucky was fair and unbiased. Such was the case, I believe, not because of the Fairness Doctrine, but because most reporters and editors subscribe to fairness and, besides, the station wants Democrats and Republicans alike to watch its news programs.

Broadcast professionals could do a better job without government surveillance of content. Controls on content are dysfunctional in that they tend to chill the reporting of the controversial. My 1982 survey of the nation's news directors also found that the Fairness Doctrine was creating problems in the news operations of 25 percent of the TV stations. At one of every four stations, regulation was more than a chilling presence, it was a problem getting in the way of television's efforts to serve the public. Broadcast news directors can provide numerous examples.

Concerns that broadcasters would abuse greater freedom if it was given to them have proved unfounded in most cases. The partial deregulation of radio in 1981 permitted stations to cut back on news if they wished. A national survey a year later found that most radio stations were doing at least as much news as before deregulation. (See Vernon Stone, "Deregulation's Impact," RTNDA Communicator, Vol. 37, May 1983, pp. 10-11.)

The same survey failed to show a relationship between deregulation and the amount of money radio stations spend on their news operations. Twenty percent said they were spending less on news in 1982 than a year earlier, but it also turned out that advertising revenue was down for 15 percent of the stations. Most of the cutbacks in radio news appeared to come from the economy rather than deregulation. (See Vernon A. Stone, "Survey Reconfirms News Pays Its Way," RTNDA Communicator, Vol. 37, June 1983, pp. 20-21.)

Financially, broadcast news is in good health, and that's another reason it does not need content regulation. When I was working in TV news in the 1950s and early 1960s, news was a public service but a financial loser at most stations. Now, as shown by my data, news pays its way at two-thirds of the radio stations and nearly all TV stations. From the start, news has sold newspapers. Now, it's the big money maker in local television and much of radio. The public has developed an appetite for TV and radio news, and the marketplace is competitive. When a station fails to serve the public, audiences can activate a self-righting process with the touch of a dial. When audiences so speak, advertisers listen.

In summary, content control of electronic media of communication underestimates broadcasters, the public and the free marketplace.

The CHAIRMAN. Thank you.

Gentlemen, go right ahead.

Mr. CHAMBERLIN. Senator, thank you for inviting representatives of AEJMC to the hearings. Dr. Rowland and I head 2 of the several AEJMC committees and divisions, including 200 to 300 scholars concerned with the topic under consideration by your committee today.

Indeed, the two of us have been asked to say that many of our members are willing to share their expertise as you try to develop a satisfactory communications policy for this country. Any of us on the panel this morning, as well as our current president, Ev Dennis, can supply you with the names of scholars willing to contribute information and ideas.

Many of these people, but not certainly all of them, would agree with the statements made by Professor Stone today. The members of AEJMC believe in a free flow of information and ideas representing as many social, economic and political viewpoints as possible. But the AEJMC resolution before you is somewhat different from those of many media organizations because it focuses more broadly on a variety of potential limitations to free expression. Many AEJMC members believe the issue of free expression involves more than simply a question of government intervention into media content. They believe that factors other than government can sometimes restrict information flow and therefore must be taken into consideration during the policymaking process.

Conventional wisdom would have us all believe that a media system affected by no government regulation whatsoever would provide the most diverse range of expression. However, many of us who study the mass media know that our current system, based on the commercial marketplace, specializes in producing an enormous quantity of information palatable to a mass audience. Our system is not as effective in providing widespread dissemination of information about minority lifestyles and concerns, ideas from the extreme ends of the political spectrum, and sophisticated analyses on a wide range of topics.

And I might say, the extreme rhetoric of 18th-century newspapers that we were hearing about this morning did not take place under a commercial marketplace system. The newspapers then were funded by the political parties.

Mr. Chairman, most men and women working in the mass media are conscientiously trying to provide adequate and accurate information about the Nation and the world. But there are many complex factors affecting the world view presented in the mass media. Media decisionmakers continue to be predominantly white, middle class, and male, and it would be amazing if their products did not reflect their experience and perceptions. They are working within a system that emphasizes information that can be easily acquired, rapidly prepared, and attractively packaged. They have limited resources at their disposal. All of these factors affect their products, a fact that has been extensively documented by a number of communications scholars.

A widespread assumption during the last few years is that the heralded new communications technologies will overcome the limitations of the conventional mass media overnight. However, a growing body of research and analysis is beginning to suggest that the new technologies may not provide a better distribution of information from a more diverse variety of sources. In general, more radio and television outlets only mean more of the same kind of information and entertainment programming. Cable so far has been able to do little more than replicate the kinds of programming already presented on television. The new technologies of direct broadcast satellites and multipoint distribution systems are seemingly intent on duplicating what is already provided on cable.

Yes, this Nation's mass media are less directly controlled by Government than in other countries. However, communications and cultural research teaches us that media in every society operate within the context of their own political, social, economic and ideological environment. Research has documented that the American media, no less than media anywhere else, reflect dominant beliefs and values.

Therefore, many members of AEJMC believe it is important to underscore that the issue of freedom of expression raises complexities beyond the question of government regulation. Policymakers need to be alert to the variety of difficulties inherent in the notion of adopting policies that allow for a maximum diversity of ideas.

Most, if not all, of the members of AEJMC want to minimize government control of mass media content. Many believe that many if not all of the attempts at content control, such as the fairness doctrine, have been historically ineffective and have the potential to be destructive of first amendment values. Yet there are also many members who believe that the nature of electronic media justifies public interest considerations such as the requirements to provide programing that may not otherwise be disseminated.

The AEJMC resolution suggests that, at the very least, you as policymakers should keep in mind ways of encouraging a free and full flow of information that do not require direct oversight of media content. I am aware that this subject is not the direct focus of these hearings, but we believe that the consideration is relevant.

In other words, while you are considering the elimination of broadcast and cable content controls, you ought to keep in mind that there are policy options other than direct content regulation to help ensure diversity of ideas. Options thought to be worthy of consideration by many, options already mentioned in the continuing debate over the revision of our communications policy, include increased support of public television and radio; more effective use of the broadcast spectrum, as has been discussed this morning; some form of effective access to community cable systems; increased opportunities for cable and broadcast ownership by minorities; restrictions on media concentration; and limitations on undue cross ownership.

In a scholarly organization such as ours, there are as many ideas as there are members. No resolution or spokesman can speak for everyone. Yet the AEJMC resolution suggests that content regulation should be minimized at the same time that policymakers pay attention to other approaches, structural mechanisms if you will, that can help ensure a wide open public debate on all significant issues.

The members of AEJMC are thankful that you are giving careful consideration to issues of free expression, and we appreciate the fact that you are seeking the views of those of us who make it our occupation to study the mass media.

[The statement follows:]

Joint Statement of William F. Chamberlin, Ph. D., Associate Professor, School of Journalism, University of North Carolina at Chapel Hill and Willard D. Rowland, Jr., Ph. D., Assistant Professor, Institute for Communications Research, University of Illinois, Urbana-Champaign

First, we thank the Committee for inviting representatives of the Association for Education in Journalism and Mass Communication to these hearings. As you know from our current President, Everette Dennis, and from the remarks of our colleague and immediate past President, Richard Cole, our organization consists of nearly 1,800 academics who teach and conduct research on a wide array of communication issues in universities and colleges throughout North America. As such there is among the AEJMC membership a good deal of interest and expertise on such matters as press and media history; the social impact of modern communications; media institutions, law, and behavior; professional skills, responsibilities and ethics; and emerging communication technologies and policy. Therefore, the questions of media regulation and freedom of expression which are wrapped up in S. 1917 and are under consideration by your committee today are regular concerns of several of the AEJMC committees and divisions, and it is as representatives of two of those groups that we were asked to participate on this panel.

Indeed, the two of us have been asked to inform you that many of our members are willing to share their expertise as you try to develop a satisfactory communications policy for this country. Any of us on the panel this morning, as well as President Dennis, can supply you with the names of scholars willing to contribute information and ideas.

But our primary assignment here is to explain and elaborate on the terms of the resolution passed by the AEJMC membership at its 1983 Convention in Corvallis and put before you today by Dean Cole. Further, we want to relate that explanation to observations about S. 1917.

A careful reading of the resolution will demonstrate that it differs subtly, but significantly, from apparently similar resolutions passed by a number of industry media organizations represented in these hearings. The heart of the resolution, as amended on the floor of the convention, states that "the public interest is best served where freedom from content regulation is protected from undue economic, government and social control regardless of the means by which information is disseminated." The emphasis is added here to highlight the language that was added when the resolution was debated.

The wording of the amendment is perhaps somewhat awkward, showing the hazards of adjusting sensitive language on the floor of a convention session, but it accurately represents the concerns of the AEJMC membership. The amendment was designed to indicate that while the members of AEJMC believe in the need to enhance the free flow of information and ideas, they also believe that the issue of free expression involves far more than the question of government intervention into media content. They believe that many factors other than government can, and do, restrict information flow, and must be taken into consideration during the policy-making process. While there would be considerable support among AEJMC members for the specific changes in the Communications Act provided for in Section 4 of S. 1917, many others would be reluctant to endorse such provisions unequivocally, absent some clear policy recognition of the many other factors—principally social and economic—that constrain mass media information production and dissemination. Many AEJMC scholars would be quick to note a number of the difficulties that communication research is finding in several of the current key assumptions underlying this bill, as well as in other attempts to rewrite the Communications Act. In light of such problems, many of our colleagues would prefer to see legislation such as S. 1917 tied to other positive public policy steps designed to overcome the deficiencies in the electronic media environment.

In order to explain these concerns and cautions let us address several of the findings and assumptions in the bill.

FREEDOM

Sec. 2(1) argues that "free and unregulated media are essential to a democratic society." This is a conventional and usually unremarkable assertion, appealing to fundamental American values. It invokes the generally unassailable faith in the freedoms believed to exist in the press and other forms of expression unencumbered by governmental regulation. Yet implicit in that view is a relatively narrow, albeit old, concept of media freedom. It focuses exclusively on the problem of media restrictions posed by action of the state. That is, of course, a particularly venerable eighteenth century view of the problem of individual, religious, and press freedoms in society. But as such it ignores nearly two hundred years of subsequent experience and insight that demonstrate that the problem of maintaining freedom is far more complicated than merely constructing protections against government.

For one thing we now understand that no medium, not even the American press, is truly free in any absolute sense. No matter how independent of government, even the boldest of newspapers is a product of its time and place. The most conscientious publishers and reporters are constrained by general values, beliefs, and habits inherent in the social and political system of which they are a part. They live in, and reflect, the essential, commonly-held mythologies of their age and community, meaning that they are able to recognize as fact and truth only those events and ideas which their culture validates as such. Thus, for instance, the American press is imbued with certain professional and ethical standards. Yet the more we study the history of the American media the more we come to observe how such values are the products of the ideology, social conditions, and economic factors of the period when they emerged.[1]

Further, it is increasingly apparent that there are powerful organizational and institutional constraints at work in the operations of the press and mass media. Considerable recent communication research has been devoted to this topic, demonstrating for instance how the demands of a competitive commercial marketplace, specializing in producing an enormous quantity of information and entertainment for a general audience, leads to mass production techniques that limit the freedom of action by professionals working within them. Most men and women in the mass media are conscientiously trying to provide adequate and accurate information about the nation and world. But they are bound by the conditions under which they must work—a system that emphasizes information that can be easily acquired, rapidly prepared, and attractively packaged. They have limited resources at their disposal, and must cope with limitations on the space and time available for the presentation of their work. They are also who they are—still predominantly white, middle-class, and male. Altogether than, these factors have substantial influence on the world-views, range, and depth of what they can produce.[2]

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[1] See, for example, Michael Schudson, "Discovering the News: A Social History of American Newspapers" (New York: Basic Books, 1978).

A corollary point here—and one that is crucial in light of the historical perspectives regularly and uncritically being presented in these hearings—is the need to recognize the extent of change in our general socioeconomic order since the founding of our republic. The images of economic and political activity—and therefore of press role and needs—reflected in the Constitution and its first ten amendments were based on a peculiarly libertarian, Jeffersonian model of small towns, closely knit communities of commonly shared values and experience. In their wildest dreams not even the Federalists could have contemplated the emergence of the highly complex, centralized, and expansive social and economic order that accompanied the growth of industrialization and urbanization during the nineteenth century. In this light the attempt by many in these hearings to project how the Constitutional Convention would have handled the electronic media is futile—and perhaps even counterproductive to those inviting such guesswork. For to speculate about what the founding fathers would have done with the First Amendment had they but known about broadcasting is simply to invite speculation about how the entire Constitution and Bill of Rights might have been rewritten had the drafters had any realistic inkling of the extent and complexity of all the other changes to come.

Therefore, as we approach the turn of the twenty-first century, the problem of freedom turns out to be far more complicated, both philosophically and practically, than it was at the end of the eighteenth century. Developing public policy for communications must take into account all these factors, recognizing the myriad ways in which the conditions of modern life challenge many of the assumptions of an earlier age. In trying to interpret traditional values in light of contemporary conditions we must recognize that such a process is fought with contradictions and that, in recognition of those complexities, appropriate public policy in communications might have to go beyond simple doctrines of restriction on government.

SCARCITY

Sec. 2 (2) of S. 1917 argues that there is "no longer a scarcity of outlets for electronic communications," and considerably testimony to that effect has been presented today and in previous hearings. The implication of that argument is, of course, that with the introduction of so many new technologies—cable, satellites, low power television, cassettes, cellular radio, personal computers, fiber optics, and so on—the conditions of spectrum scarcity that underlay the original broadcasting legislation no longer pertain.

The difficulty with this assumption is that it misinterprets a trend towards less scarcity as an accomplished fact. Clearly there are now available many more channels for electronic information dissemination—for some people in some places. But the fact remains that many such opportunities are expensive and not universally available. For example, cable is not a reality in 60 percent of American households. Further, nearly two-thirds of the cable systems in the country remain capable of delivering only 12 channels or less.[3]

In the case of the use of the broadcast portion of the spectrum, the grant of a license remains a monopoly privilege to use a particular frequency. Often, there are two or more parties interested in using a specified part of the spectrum. Several types of assignments are far more valuable than others. The licensing process requires a selection decision by some public authority. The government is, and will continue to be for a long time, responsible for choosing some applicant over another.

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[2] There are many compelling studies along those lines. Among some of the most interesting are Philip Elliott, "The Making of a Television Series: A Case Study in the Sociology of Culture," (London: Constable, 1972); Edward J. Epstein, "News From Nowhere: Television and the News" (New York: Vintage Books, 1974); Herbert J. Gans, "Deciding What's News: A Study of CBS Evening News, NBC Nightly News, Newsweek and Time" (New York: Pantheon, 1979); Gaye Tuchman, "Making News: A Study in the Construction of Reality" (New York: Free Press, 1978); and several of the essays in James S. Ettema and D. Charles Whitney, eds., "Individuals in Mass Media Organizations: Creativity and Constraints" (Beverly Hills: Sage, 1976).

[3] Most industry reports and much of the academic literature have focused on the rapid growth in recent years from the 20–25 percent subscription mark to the 40 percent level, and they tend to celebrate the newer multi-channel systems. Turning the figures around this way, however, offers a different perspective on the realistically available viewing options for most Americans.

Given the substantial vested interests in the current conditions there will be no engineering solution to the conditions that restrict entry into major market, higher power VHF-TV and AM radio. Even when means for spectrum expansion are developed, as in LPTV or relay satellites for cable or DBS, one finds demand outstripping supply. For instance, the FCC can accommodate only a portion of all the applicants for LPTV, and, in trying to relieve the pressure for satellite space, it is already having to reduce geostationary orbit separations.

Presently, then, and for the foreseeable future, spectrum abundance exists only in a relative sense, and it cannot be confused with the complete elimination of scarcity. Seen in this light the public policy consequences are perhaps more complicated than the end-of-scarcity assertions would have it.

CHILLING EFFECT

Sec. 2 (5) contends that "regulation of the content of information transmitted by the electronic media chills the editorial discretion of those media and causes self-censorship, thereby dampening the vigor and limiting the variety of public debate." There is a long and ultimately intractable debate on this issue. The proponents of the proposition, and there are many among us in communication research, point to much of the anecdotal evidence and literature adduced in these hearings and elsewhere.[4] We are not insensitive to the concerns of sincere broadcast journalists and, reflecting the differences of view on this issue among our AEJMC colleagues, the two of us are not in total agreement on it either. Without necessarily trying to resolve our own differences, we do agree that there are equally sincere and responsible opponents to the chilling effect argument.[5] Some of those come from unlikely places, even from within the commercial broadcasting industry itself, arguing that the content rules have in fact worked to increase public access and that such a dictum as the fairness doctrine can be seen "not [as] a restraint on the first Amendment—but [as] a stimulus to it" and "not as censorship."[6]

Whether or not one agrees with the latter observation, we should note that it is related to that aspect of communication research which, as suggested above, observes the extent of self-censorship implicit in the very structural forms and economic bases of the media. From this perspective the problem is, again, more complicated than that of government intervention and raises the issue of what public interest problems there might yet remain in the focus, range, and adequacy of electronic media content once the provisions of S. 1917 were adopted. These points also bear directly on the following section.

ACCESS AND DIVERSITY

Sec. 2 (6) asserts that eliminating content regulation in the electronic media "will provide the most effective protection for the right of the public to receive suitable access to a variety of ideas and experiences." This provision is, of course, built on another assumption that is never explicitly stated in this bill but which certainly lies squarely underneath it, as it does for various of the other attempts to revise the communications legislation and to ratify the current deregulatory policies of the FCC. That assumption is that through deregulation, the encouragement of new technologies, and elimination of government restrictions, it is possible to create a free marketplace in electronic communications that will provide the conditions for open competition that will in turn lead to adequate diversity of information and expression.

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[4] Within the scholarly literature one notes two particularly insightful discussions, Fred Friendly, "The Good Guys, the Bad Guys and the First Amendment: Free Speech vs. Fairness in Broadcasting" (New York: Vintage, 1977) and Benno C. Schmidt, Jr., "Freedom of the Press vs. Public Access" (New York: Praeger, 1976).

[5] Current examples will apparently be heard in later sessions of these hearings. Representative of similar views over the years would be the testimony of such observers as Robert L. Shayon (in explaining his side of his NAEB debate with Richard Jenkins), Everett Parker, and Henry Geller in hearings on a much earlier version of such "broadcasting and first amendment" legislation, U.S. Senate, Committee on Commerce, Subcommittee on Communications, Fairness Doctrine, Hearings (94,1), April-May 1975.

[6] These remarks were delivered by Daniel L. Ritchie, Chairman and Chief Executive Officer of Group W, Westinghouse Broadcasting and Cable, Inc., as part of the First Annual Everett Parker Lecture on Ethics in Telecommunications in New York City on September 9, 1983. See "Promises to Keep: Broadcasting and the Public Interest," Access, Nos. 161-162, September/October 1983. He also argues there that responsible broadcasters are already in effect meeting or exceeding the content regulations and that their elimination could actually work against stations' ability to maintain such service.

The difficulty here is that the evidence for this assumption is tenuous. Most of the support for the proposition is speculative. It is based upon such other problematic assumptions as the end-of-scarcity doctrine, and it ignores certain historical and continuing realities about the nature of American communications—realities which have always militated against precisely the marketplace presupposition and which persist within the new policy environment. The historical problem has been that there never has been a free and open marketplace in industrialized communications, and there is little convincing data that one is now emerging. Long before the rise of broadcasting and the passage of communication legislation, the purposes and industrial characteristics of American mass media and telecommunications had been well established in a commercial, centralizing, mass production, nationally syndicated ("netrwork") pattern which subsequent legislation and regulation largely ratified.[7] Those conditions are so well entrenched that in spite of all the current policy efforts to introduce new technologies and competing parties, the ultimate consequences for electronic media content and services, as juxtaposed against all the expectations and promises, appear limited and disappointing. In general, more radio and television outlets seem only to mean more of the same kind of entertainment and information programming. Cable so far has been able to do little more than replicate the kinds of programming already presented on television or in film theaters, and the thrust of much of the current cable franchise negotiations and service changes is to cut back precisely on the new, diverse, and interactive channels originally touted as their margin of significant difference. The technologies of multipoint distribution service and direct broadcast satellites are likewise constrained largely to duplicating what is provided on cable.

There is a growing body of communication research dealing with these issues. This work variously documents the problems of such things as the economic forces which even in deregulated radio encourage considerable duplication of existing forms of service rather than distinctly different program and information forms, and the tendency in industry and policy making debate to confuse increases in numbers of channels with increases in range of content.[8] When commercial radio licensees find it more profitable to become the third or fourth station in a city to offer an existisng format rather than to cultivate a whole new service form, when the fledgling second national cable news channel (SNC) can be purchased by the first (CNN) for the sole purpose of eliminating competition, and when all the other aspects of concentration and crossownership persist across the fact of the American mass media and telecommunications environment, the prospects for delivery of the open, freely competing marketplace of communications, including "suitable access to a variety of ideas and experiences," seem as remote as ever. To be sure, as used in these debates, terms such as diversity, adequacy, and quality of access and information are like the proverbial beauty—they rest in the eye of the beholder. While that clearly is a problem for the critics of current policy trends, it is no less so for their proponents. It is insufficient merely to appeal to libertarian principles without accepting the burden of demonstrating more specifically just how well the new trends are working.

CONCLUSION

In view of these observations about assumptions behind S. 1917, many of our colleagues in communication research are not content with its single-minded focus. They would suggest that several of the old principles and models of social, economic, and cultural activity no longer work in quite the simple way that many current communications policy proposals imagine. Additionally, they are acutely conscious of the broader framework of communications policy debate of which this bill is only a part. They recall the way in which changes in federal policy for common carrier, broadcasting, cable, and the entire array of new electronic communications were originally to have been considered altogether in a complex pattern of tradeoffs that would have recognized a number of the limitations discussed here and would have therefore protected many public service needs that would otherwise be ignored. They have noticed how, instead, during recent years all the separated regulatory, judicial, and legislative proceedings have been broken apart into a series of piecemeal actions that have tended primarily to support the needs of certain interested parties and to abrogate the understandings that many thought to be implicit in the initial approaches. They are sensitive to the way in which appeals to constitutional principle can mask efforts designed primarily to seek economic advantage, as in the broadcast industry thrust to push all deregulatory initiatives to the point of eliminating all vestiges of a public interest standard for licensing and thereby finally achieving legitimation of private property claims on spectrum assignments.[9] Accordingly, many scholars would urge that initiatives such as S. 1917 be recast in the broader context of contradictory social and public needs and a more comprehensive communications policy framework.

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[7] For treatments of two separate, but ultimately closely interrelated central streams of communications regulatory and legislative policy activity, see Willard D. Rowland, Jr., "The Process of Reification: Recent Trends in Communications Legislation and Policy-Making," "Journal of Communication," Autumn 1982, 32:4; 114-136; and Dan Schiller, "Telematics and Government" (Norwood, N.J.: Ablex, 1982).

[8] For discussion of these issues see, Theodore Glasser, "Competition and Diversity Among Radio Formats: Legal and Structural Issues," "Journal of Broadcasting" (forthcoming); Don R. LeDuc, "Deregulation and the Dream of Diversity." "Journal of Communication," Autumn 1982, 32:4; 164-178; and U.S. House, Committee on Energy and Commerce, Subcommittee on Telecommunications, Consumer Protection, and Finance, "Telecommunications in Transition: The Status of Competition in the Telecommunications Industry," Majority Staff Report, (97,1), November 3, 1981.

To return finally to the AEJMC resolution and the diversity of opinion it reflects, we would agree that most, if not all, of the members of AEJMC want to join with you in seeking ways of minimizing governmental control of mass media content. Many believe that such attempts at content control as the fairness doctrine have been historically ineffective and have the potential to be destructive of First Amendment values. Yet there are also many members who believe that the nature of the electronic media justifies public interest considerations, such as requirements to provide programming that may not otherwise be disseminated.

The AEJMC resolution suggests that at the very least, you, as policymakers, should keep in mind ways of encouraging a free and full flow of information that do not directly require direct oversight of media content. In other words, while you are considering the elimination of broadcast and cable content controls, you ought to keep in mind that there are policy options other than direct content regulation to help insure a diversity of ideas. Options considered worthy of consideration by many members—options already mentioned in the continuing debate over revision of our communications policy—include increased support of public television and radio, more effective use of the broadcast spectrum, some form of effective access to community cable systems, increased opportunities for cable and broadcast ownership by minorities, restrictions on media concentration, limitations on undue cross ownership, and, yes, even a spectrum fee.

In a scholarly organization such as ours, there are as many ideas as there are members. No resolution or spokesman can speak for everyone. Yet, the AEJMC resolution suggests that content regulations should be minimized at the same time that policy makers pay attention to other approaches—structural mechanisms, if you will—that can help insure a wide open public debate on all significant public issues.

The members of AEJMC are thankful that you are giving careful attention to the issues of free expression. They are glad that you are concerned about developing a carefully considered communications policy. They also appreciate the fact that you are seeking the views of those who have made it an occupation to study mass media.

The CHAIRMAN. Doctor, thank you very much.

Let me ask you—and Dr. Rowland you could answer if you like—you say the nature of the electronic media justifies public interest considerations such as requirements to provide programming that may not otherwise be disseminated. This is the same question I asked Dr. Krattenmaker about children's television. Is that one of the things you would be talking about, for example?

Mr. ROWLAND. Yes, I should think so. I think the kinds of concerns that are reflected in our statement about the kinds of constraints that exist on commercial media in this society have clearly led to some difficulties in the area of providing children's programming, and many people within the commercial media themselves are not pleased with the results on that score.

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[9] In this regard one wants to note recent industry representations on the principle of public ownership of the spectrum, as in U.S. House, Committee on Energy and Commerce, Subcommittee on Telecommunications, Consumer Protection, and Finance, "Broadcast Reform Proposals," Hearing, (97,1), November 3, 1981, especially pp. 121 ff. and subsequent NAB correspondence with the subcommittee.

So there is a serious question as a society about where we are going in that area.

The CHAIRMAN. Should there be other kinds of compelled programing?

Can you give me some examples of what you are thinking of?

Mr. ROWLAND. Well, I am not arguing that we should be compelling children's programing. I think the thrust of our testimony there is to look for those sort of structural provisions outside of forcing anyone to do them, per se.

The CHAIRMAN. All right, but what you are saying, perhaps, is this. Because of the statement in here about white male ownership—and indeed, you are right, the broadcasting industry is by and large led by white males—if you had good access for minorities, if you had limitations on ownership, then you are going to start to get a cross section of programing based upon ownership of the stations. If you encourage sufficient diversity of ownership, you will get sufficient diversity of programing.

Mr. ROWLAND. Well, one hopes. It is an issue of significant debate now within our field about the extent to which even providing a variety of different types, demographic types, ethnic types of ownership will in fact lead to a diversity of content. There are questions about the power of the commercial forces at work that may in fact provide some restraints and limitations.

The CHAIRMAN. In your statement you say "In general, more radio and television outlets only mean more of the same kinds of entertainment and information programing."

What can you expect when you have a decision like the *Simon Geller* case, where Mr. Geller was trying to give a different kind of programing and he lost his license becase he was doing that?

How was the public interest served? Here is Gloucester, a town that gets 40 radio stations, and Mr. Geller, who programed classical music all day lost his license to somebody who promised to give 29 percent news, accuweather, traffic reports and other similar information. It is my hunch that Gloucester is not lacking in traffic reports or weather reports.

How does that kind of a decision encourage diverse programing?

Mr. ROWLAND. Insofar as I am concerned, it does not.

The CHAIRMAN. But that is the Government's idea of what is good for the listener, and apparently what Mr. Geller has is not as good for the listener as what now becomes a clone, of the other 39 stations.

Mr. CHAMBERLIN. I do not think there is any question but that the *Geller* case involves the kind of thing most of the members of our organization are bothered by, that is close Government attention to content.

The CHAIRMAN. That was not a content case per se. Nobody was requiring him to program an hour of rock and roll for each hour of classical music. They were basically saying at license renewal time that the public is better served with a little more diverse programing on every station. The public benefits more by having every station diverse programing more than it benefits by having one being all classical and another all rock and another all talk and another all news.

Mr. **Rowland**. You know, the thing that interested me about that decision, Senator, is the extent to which it reveals a kind of predisposition in the administrative apparatus to perceive as more valuable large corporate licensee types rather than somewhat eccentric individuals doing their own thing out of the basement of their own house, in effect, and I think it is that kind of concern that exists behind the statement and among many of the people that we represent.

The **Chairman**. You do not think they will take away the New York Times license for WQXR for broadcasting classical music.

Mr. **Rowland**. Unlikely.

The **Chairman**. No, I think you are probably right. That might be a slightly bigger fish to take on than Mr. Geller.

Mr. **Rowland**. So that addresses that question of the context in which the process of the mass media as a whole in society take place. That is the concern of the research I think.

The **Chairman**. So let me make sure, Dr. Rowland and Dr. Chamberlin, that I follow the thrust of your statements. You have no love for the content doctrines per se. You just want to make sure that when they are gone there is some mechanism—I cannot think of a better word for it—which atempts to guarantee some diversity, some opportunities for minorities and some spectrum of programing that might not otherwise be programed in a total market situation.

Is that a fair synopsis?

Mr. **Rowland**. Yes, I think that is reasonable indeed. I think it would be fair to say that there are colleagues of ours who would be stronger in opposition to the content regulation, so we have to be clear on that. But I know personally speaking I am very much concerned about making these other sorts of provisions. I have worked in public broadcasting before. I have a good sense of what it can do. I think we should be doing a better job for it.

The **Chairman**. I commented earlier about the equal time problems with debates. I am fully aware that the FCC has changed its position on debates. I am also fully aware they are going to be sued in the courts about it. I am delighted that they are going in that direction, but all it does is heighten the conviction I have that this FCC can go one direction and the next one can go another direction. Therefore, I would prefer to legislatively eliminate the basis upon which these doctrines exist, and I believe that candidates will get more exposure rather than less if the doctrine do not exist.

Gentlemen, I have no more questions. You were very kind to wait all of this time. It has been most helpful. If you would give my best to Ev Dennis, I would appreciate it.

Thank you.

We are adjourned until Wednesday, when we will take up these hearings again.

[Whereupon, at 11:45 a.m., the committee recessed, to reconvene Wednesday, February 1, 1984.]

FREEDOM OF EXPRESSION ACT OF 1983

WEDNESDAY, FEBRUARY 1, 1984

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, D.C.

The committee met, pursuant to notice, at 9 o'clock a.m., in room SR-253, Russell Senate Office Building, Hon. Bob Packwood (chairman of the committee) presiding.

OPENING STATEMENT BY THE CHAIRMAN

The **CHAIRMAN**. The committee will come to order, please.

This is the second day of hearings on the freedom of expression bill. On Monday we heard from a variety of trade association witnesses, most of whom support the bill but also some who do not. Those in support include the American Newspaper Publishers Association, the American Society of Newspapers, Sigma Delta Chi, which is the professional association for journalism, and the deans and teachers of journalism speaking through their trade association.

Today we will have a variety of witnesses again, both pro and con. I want to emphasize we are trying to make sure that everyone, or at least every organization that wants to be heard in opposition will have a chance to be heard. There are so many who want to speak in support that they cannot all be fitted in.

We will leave the record open for a substantial length of time to take statements from any of those groups who could not appear in person.

This morning we will start with Mr. Floyd Abrams, an attorney who is well versed with issues and cases involving the first amendment.

Good morning.

Mr. **ABRAMS**. Good morning, sir.

The **CHAIRMAN**. Go right ahead, sir.

STATEMENT OF FLOYD ABRAMS, COUNSEL, NEW YORK, N.Y.

Mr. **ABRAMS**. Thank you.

I appreciate your invitation to appear here today with respect to S. 1917. I should say at the start that notwithstanding that I have with some frequency represented broadcasters as well as publishers, I do want you to know, Senator, that I speak on my own behalf today with respect to my own views as to this piece of legislation or what I hope will be this piece of legislation.

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I fully support the enactment into law of S. 1917. Usually, it seems to me, in fact almost invariably, the best thing Congress can do to the first amendment or first amendment values is to leave them alone, to refrain from acting in a manner inconsistent with the first amendment's law or spirit. Where congressional action is generally needed in the first amendment area is not to expand first amendment rights, but to undo the act of some branch of government in contracting those rights. That is what S. 1917 would do.

Since the preexisting legislative and judicial incursions into the freedom of expression of broadcasters, and I believe, of all Americans, so needs undoing, and the risks of perpetuation of the current system are so great, I believe the adoption of S. 1917 can fairly be described as the single most far-reaching step of our era in support of first amendment values.

I do not say this on the ground that our broadcasters are the American equivalent of the silenced voices in totalitarian states abroad, or even the employees of the state-run and too often state-dominated broadcast systems in democratic countries abroad. Far from it. I speak as I believe S. 1917 speaks, in uniquely American terms, in the context of a nation which has almost invariably been willing to run the risk of irresponsible press behavior for the incomparable benefits of what DeTocqueville described as the press serving as an eye "constantly open to detect the secret springs of political designs and to summon the leaders of all parties in turn to the bar of public opinion."

At their core, each of the statutory sections which S. 1917 would repeal or amend is inconsistent with what is most fundamental in our constitutional history, fear of governmental abuse, governmental misconduct, and governmental repression. To be sure, no one of the sections at issue was passed for those reasons. Section 312(a)(7) was adopted to assure more access of the public to the political views of those running for office. Section 315 was passed to assure equality in opportunities for candidates for political office. The fairness doctrine was drafted to make sure there was reasonable time afforded on radio and television for the expression of contrasting views on controversial issues of public importance. The same sort of good faith benedictions may be offered in one way or another for each of the sanctions involved.

But when we think in constitutional or historical terms in this country, we generally have chosen not to assume good faith, reasonable conduct and just behavior on the part of our public officials. We fear the worst and protect against it by our Bill of Rights. We recall, particularly this year, the Orwellian world in which government could hardly be trusted to take any steps designed to enhance communication and in which the book's heroine says of news distributed in that society: "Who cares? It's always one bloody war after another, and one knows the news is all lies anyway."

We, in contrast, have historically said with Madison, when asked about the possibility of press misconduct in the absence of legal constraints, "some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press."

We have said historically with Brandeis, when told that our Government officials will act in good faith that "experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom," said Brandeis, "are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."

The question, I think, is why we do not say all of these things with respect to the content control imposed by our Government on broadcasting, the single most important means by which most Americans receive most of their news. In part the answer is historical. What we have been doing since the adoption of the Federal Radio Act of 1927 we seem to keep doing. Inertia seems as great a force in the area of public policy decisions as in personal ones. What has occurred for over 50 years seems to keep occurring. As FCC Chairman Mark Fowler has phrased it:

> In many ways we have grown comfortable with these regulations. Over time and because there is no smoking gun in our decisions showing full-tilt censorship, these rules have somehow become, well, acceptable.

If Chairman Fowler is correct—and I do agree with much of his commentary in this area—the problem is at least partly one of education. We know, for example, that the *Red Lion* case itself grew out of efforts of the Democratic National Committee to inhibit right wing broadcasts in the early 1960's to such an extent that broadcasters would, in the words of one DNC memorandum, "start dropping the programs from their broadcast schedules." We know as well that President Nixon sought to use the licensing power of the FCC to punish the Washington Post in its capacity as holder of licenses, for critical articles about his administration. The temptation to use the content control powers over broadcasters are, when matters seem important enough, nearly irresistible. It is not a partisan matter; it is a human one.

Nor should we be surprised when politics is inevitably involved to some degree in broadcast regulation as it is currently enforced. A 1976 study prepared for this committee reviewed the appointments over a 25 year period ending in 1974 of 51 FCC and Federal Trade Commission members. It concluded that about one-half of the appointments to both commissions involved a significant degree of congressional sponsorship, that 14 of the Commissions were appointed and sometimes reappointed almost entirely due to the efforts of one Member of Congress, and that most appointments were the result of what the staff report called "well-stoked campaigns conducted at the right time with the right sponsors, and many selections can be explained in terms of powerful political connections and little else."

I offer a slightly more personal example. I was counsel to the three networks at the Supreme Court level in a case involving the question of when in 1980 the networks were obliged to sell time to the Carter-Mondale campaign. The case, which was ultimately decided under section 312(a)(7) in favor of the Carter-Mondale campaign began with two rulings by the FCC that the networks had failed to sell the time sought to be purchased at an early enough date. On both occasions, the seven members of the Commission strictly divided along party lines, the four Democrats voting for the

Carter-Mondale position and the three Republicans voting against it. This led to commentary by both Judge Edward Tamm in his concurring opinion in the U.S. Court of Appeals, and Supreme Court Justice John Paul Stevens in his dissenting opinion. Justice Stevens observed that the "possibility that the Commission's decisions under section 312(a)(7) may appear to be biased is well illustrated by this case."

One, I think, need go no further along this line of argument, and I make no further argument about it. That appearance in and of itself is an affront to our system. It is one which S. 1917 would end.

There are reasons often cited for the perpetuation of the current system I will leave to others. The most up-to-date statistics demonstrate what I believe to be the absurdity of the scarcity theory that has been used to justify the regulation of broadcasters in a way both unthinkable and unconstitutional as applied to the print press. Suffice it to say that as each year passes, that theory is less tenable.

As FCC Commissioner Anne Jones observed 2 years ago:

> To argue that sources of news and information are scarce in this country is, in my view, to blink reality. All but the most isolated Americans are deluged with more news and information than they can possibly absorb or make use of from radio, television, newspaper, magazines, pamphlets, billboards, 'Junk Mail,' and word of mouth. The problem, as Alvin Toffler noted in Future Shock, is not scarcity of information but information overload.

"Even," Commissioner Jones said:

> If attention is limited to electronic media, which seems to me an artificial limitation, it is still hard to argue scarcity with a straight face. At least 90 percent of American households receive three or more over-the-air television signals and six or more radio signals. Virtually all Americans are served by several times more broadcast stations than daily newspapers.

"Where," Commissioner Jones asked, "is the scarcity?"

Then there is the so-called impact theory. Radio and television, it is said, have such enormous impact on the public that there is greater need for regulation if it is reasonable and in the public interest.

Passing the question of just what is meant by impact, one can turn the argument on its head: To say that the medium of communication with the most impact in communicating news to the public should be most regulated by Congress and least protected in its first amendment free-expression rights is to invert first amendment values. The Government should, at the very least, be no more empowered to regulate the means of communication with the most impact on the public than to regulate other modes of communication.

There is, in conclusion, I think, a lesson to be learned from the exceptions with which the sections at issue are riddled. The deference to broadcasters under which the fairness doctrine has yet to result in any network losing a fairness doctrine case; the exceptions to the personal attack rules of newscasts, on-the-spot coverage of news events, news documentaries, news interviews and news commentary or analysis contained in newscasts: the suspension this year and in past years of equal time rules to allow presidential debates; these exceptions—and there are or purport to be others—show a healthy desire to steer clear of first amendment sensitive areas. What they actually do, I believe, is to prevent the sections from operating as their proponents would like while still leaving, in effect, all of the dangers those of us who oppose these sections believe. It is reminiscent of Prof. Harry Kalven's observation in another area of strong first amendment interest that "the mountain has brought forth a pretty small mouse."

It is small in one sense: It does not work. And I suspect those in favor of these sections and opposed to S. 1917 would agree with that. It is large in another. It might someday. And any day, today included, it probably leads to less television of the sort television's critics would like than would the absence of the requirements.

In conclusion, Senator Packwood, I think there is one first amendment interest that is pre-eminent. It is an interest well served by S. 1917. It is the concern that the Government will misbehave and that it will in the end seek to deprive us of our liberties. Any such effort will start—can one doubt it?—with television. "Evil men," Justice Owen Roberts wrote, "are rarely given power; they take it over from better men to whom it had been entrusted."

S. 1917 is in my view a major step toward protecting us and our children from the future none of us would like to see.

Thank you, Senator Packwood.

The CHAIRMAN. Mr. Abrams, you have had a lot of experience in cases involving both defamation and the first amendment.

Mr. ABRAMS. Yes, sir.

The CHAIRMAN. There was an article in the New York Times over the weekend centering on libel cases but hinting at the thought that the Court is moving away from protection of journalists. It did not mean just broadcasters; it meant all journalists.

I would be curious to hear your comment on that article.

Mr. ABRAMS. I certainly agree with that theme as it applies to libel cases. The press, journalists have not won a libel case in over a decade now in the U.S. Supreme Court. We have had a significant cutting back on the definition of who a public figure is, some cutting back on the availability of summary judgment in libel cases, and I suppose most important of all, a sort of change of judicial mood which is perceived by everyone on all sides of these issues.

And in the libel area, at least short term, I suppose one may say that that is probably likely to continue. In other first amendment areas, I think that is less true. I think in other first amendment areas the Court has continued to be rather responsive to first amendment interests, in some cases very responsive to first amendment interests, except where broadcasters are concerned.

But I would not fault the current Court in general for its indifference to first amendment rights across-the-board because as a general matter I think the press has done pretty well in the Supreme Court.

The CHAIRMAN. Let me ask you another question.

It seems to me, as surely as the night follows the day, that coming down the road very soon will be another *Miami Herald* type of case. A case which, if it does not involve an equal space statute, will at least involve a newspaper publishing electronically and being subject to the current content doctrines.

Let's assume you have an FCC that does not change and they want to subject this electronically published newspaper to the content doctrines. Indeed, the factual groundwork is laid. The newspaper is transmitting electronically, it is publishing through television. That case goes up to the Court. What does the Supreme Court do?

Mr. ABRAMS. Well, it has three choices. It can either follow the electronic model of *Red Lion* and say electronic publishing is electronic, and therefore, anything Congress wants to do within some degree of bounds, is constitutionally permissible. It can follow the *Tornillo* model, or it can say that this is something different, and we judge it on its own.

The problem with the third, which is the direction the Supreme Court has been going in a lot of other areas in recent years, is it does not tell us anything. It does not allow me to answer the question of what they will do if all I can do is to tell you they may say this is different than the other two.

One thing that might happen from that case, Senator Packwood, is that the Court might then have to face up again to what I believe to be the utterly irreconcilable nature of *Tornillo* and *Red Lion*. They have chosen not to do that. They have treated these different worlds, as they view them, as entirely different worlds, unrelated, with no citation very often.

The CHAIRMAN. And you almost sense that is deliberate.

Mr. ABRAMS. Yes.

The CHAIRMAN. These are able people.

Mr. ABRAMS. Indeed.

The CHAIRMAN. And when you read the original *Miami Herald* decision by the Florida Supreme Court and read the U.S. Supreme Court's decision, are you struck by how the Court could decide it without mentioning *Red Lion?*

Mr. ABRAMS. Yes. After all, *Red Lion* was, as you note, a central prop of the Florida Supreme Court's opinion. It was argued in the briefs of counsel. It was argued orally in court. Yet the Court acted as though it did not exist when it decided the *Miami Herald* case.

Now, there were some of us that lept too soon when the *Tornillo* case came down to the hope that maybe they were really so dubious about *Red Lion* that they simply could not come up with a defense of it. That is not true. We were wrong. There are later cases in which in footnotes at least the Court has said in effect, of, or contrast, *Miami Herald* and *Red Lion*.

But Alexander Bickel of Yale Law School used to say that the law is not that foolish. It seems to me, Senator Packwood, that we cannot continue long term—I mean 20 years long term—acting as though things which are basically the same are at their core different. And I do not believe the Supreme Court long range will do that. And if they do not do it, the question is what will they do? Which model will they choose?

And one of the most beneficial results, I believe, of the introduction of S. 1917 and its possible adoption someday is to deal directly with that issue.

The CHAIRMAN. Well, at least if we pass S. 1917, we take away the statutory basis for the regulation. That does not mean some Congress cannot reimpose the law and FCC cannot reimpose the regulation. It is not as failsafe as a constitutional amendment, but it is better than leaving the statute on the books. The only other hope, assuming we do not pass S. 1917 and nothing changes, is that the Court one day, when faced with another case, will come down on the other side. We can only hope the Court will say there is no longer any scarcity, and whatever doctrines rested upon that may have been permissible in the past, but we can no longer sustain the regulation of the electronic media on that basis.

I cross my fingers and hope they might do that, but there is no guarantee.

Mr. ABRAMS. I agree with you completely, Senator Packwood. What wakes me up sometimes in the middle of the night is the opposite fear, that is, that someday down the road they might say there is an awful scarcity of newspapers, and we remember what we used to say about scarcity in *Red Lion* and the first amendment and also that led us to. I hope it does not lead them away from the result they previously reached in the *Miami Herald* case.

The CHAIRMAN. I agree.

Mr. Abrams, thank you very much. It is intersting to have a witness who is a practicing lawyer who has had to deal with these issues month in and month out before the courts.

Mr. ABRAMS. Thank you.

The CHAIRMAN. Next we will take Mr. Donald Smullin, president of TRC Communications, who is representing the Inter-American Association of Broadcasters.

It is good to have you with us this morning.

STATEMENT OF DONALD E. SMULLIN, PRESIDENT, TRC COMMUNICATIONS, INC., PHOENIX, OREG., ON BEHALF OF THE INTER-AMERICAN ASSOCIATION OF BROADCASTERS

Mr. SMULLIN. Good morning. My name is Don Smullin, I am the owner of TRC Communications and the licensee of three small AM and two FM stations in Oregon, part owner of an AM/FM in Hawaii, general partner of a UHF television station in Sacramento, Calif., and an applicant for a VHF television station in Caldwell, Idaho near Boise.

I am a past president of the Oregon Association of Broadcasters and a past member of the CBS Television Affiliate Board.

I am actively involved with the Inter-American Association of Broadcasters, both as a personal member of the association and as a representative of the National Association of Broadcasters International Committee. The Inter-American Association of Broadcasters is the only international organization in the world which solely represents private broadcasters, and as such, represents broadcasters throughout the South, Central and North America, and Spain. It is based in Montevideo, Uruguay, and is a recognized nongovernmental organization in consultative relationship with UNESCO. The association was founded in 1946 and consists of six standing committees. I am one of six members on the Committee for Freedom of Expression. The other members are from Chile, Peru, Bolivia, Argentina, and Brazil.

As a member, I have attended UNESCO conferences pursuing our fight against the Soviet-inspired New World Information order.

In September 1983 I attended the IAAB's biannual conference in Rio de Janeiro. In attendance were members from 10 countries from South and Central America, Spain, the United States, and an observer from UNESCO. The convention first consisted of individual committee meetings whose purpose was to propose resolutions for the assembly as a whole. As is its custom, the Committee on Freedom of Expression received reports from each country in the Americas on the status of freedom of expression in their country. The committees received specific personal requests for action from four countries, Ecuador, Costa Rica, Nicaragua, and the United States.

I presented the report on Freedom of Expression in the United States as it is currently restricted by the fairness doctrine. After spending most of the morning listening to pleas for help in countries such as Nicaragua where broadcasters are dying, Costa Rica, where they are in jail, and in Ecuador where there are severe restrictions, the committee was surprised to hear the extent of restrictions on the free flow of information in the United States. One member said he had always held the United States as the leader of freedom of expression, and now he was appalled to learn that it was not the ideal he had believed. Because of this disbelief, their questioning was intense, and after considerable interrogation, the delegate from Ecuador stated, "It sounds better in Ecuador than in the United States."

A resolution was then adopted by the committee and submitted to the assembly as a whole. Once before the assembly, the resolution was again met with disbelief as all present had looked to the United States as the leader in freedom of expression.

Again, full debate ensued with a resolution finally adopted as follows:

RESOLUTION ON BROADCAST IN THE UNITED STATES

APPROVED FOR THE 16TH ASSEMBLY OF IAAB, RIO DE JANEIRO, OCTOBER 20, 1983

Having seen the situation of broadcasting in the United States of America,

Resulting:

(1) That in the USA different regulations are being applied to radio than to the press.

(2) That these regulations are more severe and burdensome for radio than for the press.

(3) That Senator Bob Packwood is struggling to have this situation modified.

Considering:

That the same broad regulations should rule the activities of the press and of broadcasters.

The General Assembly of the IAAB decided to declare its support to any effort aimed at having the rules in force in the USA treat both areas equally, to revoke what is known as the "Fairness Doctrine" in the country.

This resolution has now received worldwide distribution to broadcast associations in Europe, Asia, Africa, Arab States, the Americas, the Caribbean, and the Eastern Bloc nations.

Seventeen years ago, the IAAB assembly met in Buenos Aires. It adopted then a detailed book called "Doctrine of Private Radio Broadcasting in the Americas." Its Basis No. 1 of the doctrine reads as follows:

As an instrument of public information, radio has a task similar to that of the press; it should therefore be recognized the same rights and it should be accorded the same legal protection, there being no justification for discriminatory treatment between the two information media. To pretend that it is not possible to recognize equal freedom of information to radio as to the press, because the impact of radio on public opinion is greater, would be equivalent to claiming that an eloquent man should not enjoy the same freedom of opinion as a notoriously tongue-tied individual.

My personal opinion as a broadcaster is that broadcast journalism and editorializing in the United States has been reduced to milk toast at a time when vigorous debate yielding controversial and new ideas is desperately needed. Broadcasting is now the major source of information for the American public; yet we have a broadcast system that quotes newspaper editorials rather than taking their own controversial stand. This is not to say there are no broadcast editorials in the United States, but what little editorializing is being done is primarily being done by those broadcasters who can afford the attorney fees to defend themselves.

I appreciate the honor of appearing before such esteemed persons as yourself, and I personally urge your consideration and passage of S. 1917.

Thank you.

The CHAIRMAN. Mr. Smullin, with few exceptions, I would agree with your statement about broadcast editorials. There are a few, very few, being done that have real bite and meaning to them. Indeed, you are right, those broadcasters are willing to run the risk that that entails. Most of the editorials, unfortunately, are very bland and tilt on the side of safety. And if they have to give time for a response, it is also normally a perfectly safe response.

You will not find many editorials that are tough, castigating and critical in the sense that you would find with newspaper editorials.

Mr. SMULLIN. Yes.

The CHAIRMAN. Until you talked to me about the association, this is the first time I knew such an organization existed.

Are there private broadcasters in all the Latin American countries?

Mr. SMULLIN. Yes, except we have members from Cuba and Nicaragua in exile.

The CHAIRMAN. Cuba is the only country to date in Latin America that has no private broadcasting?

Mr. SMULLIN. Yes.

The CHAIRMAN. The argument is made over and over on the pervasiveness and the impact of broadcasting as opposed to print and that broadcasting is more important, and, therefore, should be regulated. It seems to me we ought to come to the opposite conclusion: if broadcasting is more pervasive and significant, we ought to exercise all the more care in what kind of control government has over it as opposed to control over a medium that is less pervasive and less influential. But those who disagree still come to the opposite conclusion.

The fear I have is what Mr. Abrams expressed—you are fully aware of this in your business—that the mix between print and broadcast will become so blurred that you will run the risk one day of all of these doctrines being applied to print as well as broadcast.

Mr. SMULLIN. I agree, yes, sir.

The CHAIRMAN. I have no more questions.

Thank you very much for coming. I appreciate it.

Our next witness is Prof. Roy Fisher, Professor at the University of Missouri School of Journalism, Dean Emeritus.

Dean, we are glad to have you with us this morning.

STATEMENT OF ROY M. FISHER, PROFESSOR AND DEAN EMERITUS, UNIVERSITY OF MISSOURI SCHOOL OF JOURNALISM, WASHINGTON REPORTING PROGRAM

Mr. FISHER. Thank you. I appreciate the opportunity to talk to you about this subject, Senator, and I want to explain that I speak to you from experience on both sides of journalism, print and broadcast as well, and from experience as the Dean of the University of Missouri School of Journalism. My newspaper experience was primarily with the late Chicago Daily News where I served in various capacities from police reporter to editor-in-chief. My broadcast experience came primarily as the executive responsible for the news and public affairs programing at the University of Missouri's two stations, KOMU-TV, which is a commercial, network-affiliated station in central Missouri, and KBIA, a public radio station.

With great respect for Floyd Abrams and his experience of which I am very much aware, and I admire him greatly, the fairness doctrine, far from being an infringement on the first amendment rights, is in fact a mandate to broadcasters to make good use of their first amendment rights. This mandate is reasonable because the nature of broadcasting is such that full reporting of controversial issues is costly and therefore likely to be neglected.

A precedent for establishing a general standard for serving the public interest exists in the postal incentives offered to newspapers, magazines, and books. To qualify for a second class postal rate, for example, a newspaper must debate at least 25 percent of its space—and you could make that read time—to news and editorial matters. This amounts to a financial subsidy not available to publishers who use all of their space for advertising. This subsidy, like the fairness doctrine, arises from the need in a democracy for an informed electorate. While the postal subsidy may not be necessary for many newspapers today, it remains a useful and appropriate incentive for those thousands of publications that still depend primarily on the Postal Service for their distribution.

During the past century, this country has developed a communications system which we might call a consensus press or consensus media. The old party newspapers have virtually disappeared. Personal journalism is about gone. What we now have is a communication system, both print and broadcast, that seeks to provide a credible news report to the broadest possible audience. It reports controversial issues in a pragmatic, nonideological style intended to be acceptable to all sides of the issue.

This was not done for ideological reasons, not even in the interest of fairness. It was done to produce a credible medium through which advertising can reach the maximum audience. Nevertheless, the public interest has been well served by this system. It has provided a democratic society with a common information base upon which policy decisions can take place. This has contributed greatly to our ability in this country to arrive at public agreements essential to our democracy.

The fairness doctrine contributes to that information base by being an ever-present conscience for the broadcast media which, as I point out in my paper that I submitted earlier, find a thorough and multifacted reporting something generally to be wary of. That is because thorough reporting requires more priceless air time and also because anything more than 30 seconds runs, alas, the fatal risk of providing some listeners with more information than they want to hear on a given subject.

The news director can almost hear the dials going click, click, click when he runs over a 30-second news story. This is what explains the trivialization of broadcast news. This is what chills the broadcaster's ardor for controversy.

As useful as the fairness doctrine has been thus far, it will be even more useful in the future. As communication channels proliferate, today's large audiences will break into fragments. Competitive media will begin going after more specialized audiences. The magazine industry has already done so. Our common information base will be shattered. We will have a cacophony of voices, each trying to appeal to some special segment of our society.

Without the mandate to give a reasonable amount of time to the discussion of controversial issues and to discuss them fairly, most of those voices will be shouting the special interests of their particular target audiences. That does not contribute to the kind of consensus we need in a democracy.

The fairness doctrine is a mild reminder that the airwaves are held in trust by their users, and it has a continuing function in our democratic system.

Thank you.

The CHAIRMAN. Dean, are you familiar with the *Simon Geller* case?

Mr. FISHER. Not very well. I do not really want to discuss it. I am not that familiar with it.

The CHAIRMAN. Let me give you the facts as fairly as I can and tell me if you think the public is served by the result the FCC has reached. Geller has a small station operating in Gloucester, Mass. It broadcasts classical music all day long. There are relatively few ads, no weather, no traffic and no news.

This is what Mr. Geller said he was going to do in his licensing applications. He did not mislead anyone.

Mr. FISHER. Oh, yes, I know that. I know the case, yes.

The CHAIRMAN. He was challenged at license renewal time by someone who said they would put on weather, traffic and what not. He lost his license on the theory that he was not serving the public interest, despite the fact that the record shows Gloucester gets 40 radio stations. Gloucaster is not short of traffic reports, I assume. I do not know what the others broadcast.

Do you think that is a good result?

Mr. FISHER. I think in that particular case obviously there is a loss if that classical station goes off the air because of this. It is one of the problems that the legislation of any law is likely to produce, instances where unfairness or undesirable effects occur.

But if you choose between a station being required to remind its readers that it has a public interest in the performance of our democracy and in reporting news and public affairs issues, and if you choose between a doctrine that requires that and one that encourages broadcasters to ignore the public issue because it is safer to ignore the public issues, then I would opt for the former.

The **Chairman**. But I believe what we are trying to do is encourage diversity.

Mr. **Fisher**. Oh, yes.

The **Chairman**. But you will not get diversity if you require all stations to have weather reports, traffic reports and 3 minutes of news every hour. What you are going to get are clones.

Mr. **Fisher**. We have diversity now in our news, and while some stations use their diversity more effectively than others, the fairness doctrine cannot be faulted on suppressing diversity, and I do not think it can be faulted on suppressing vigor in the news.

I think that the reason stations do not get into controversial subjects in a heavy way is because of listener loss, not because of fear of the FCC.

The **Chairman**. That may or may not be. I would be willing to bet, considering the number of radio stations we have, that you would get more diversity of news and more controversy if they did not have to worry about the fairness doctrine as they do now.

Mr. **Fisher**. Having served on the inside of newspapers and radio and television stations alike, I think that the pressure that is brought to bear against television stations in most markets is almost irresistible for those stations that would take courageous positions on the air.

Now, you might argue that if they are not going to take courageous positions, if they trivialize the news, then what good is the fairness doctrine anyway? The one argument that I think has some validity for abolishing the fairness doctrine is that it has been ineffective in its goals. But it is my judgment it has been ineffective not because it is the wrong doctrine, but because of the nature of broadcasting.

The question of adding time to go into detail on matters such as National Public Radio does, for example, comparing the network broadcast news to the MacNeil-Lehrer Report is a good revelation as to the nature of broadcasting which depends for its financing for serving on the largest possible audience.

The **Chairman**. Let me ask you an historical question, because we have this perpetual issue of newspapers, periodicals and mail rates. When I recall the history of it, it was not so much like the fairness doctrine, in that they had to have so much news and comment or they could not qualify; it was the other way around. Actually, 25 percent is a relatively low standard for most newspapers.

What we wanted to make sure of was that news publications were circulated. We thought this was a good idea. And we set that standard to differentiate them from advertising or junk mail. It was not in any way a fairness standard. We wanted to make sure that we were not going to subsidize purely business endeavors with a subsidized mail rate.

Mr. **Fisher**. It does not attempt to control the content of the newspaper at all. The fairness doctrine really does not try to attempt to control the content of the broadcast, but since it does not have a postal subsidy, the fairness doctrine was the best tool available back even in the days of Herbert Hoover when he was Secretary of Commerce and they were working on the Radio Act to assure that radio would be used for more than advertising and entertainment. If there is a better way to be sure that the public airways are used in the public interest for more than advertising and entertainment, then so be it. But we have not really come up with any other.

The CHAIRMAN. Dean, I have no more questions. Thank you for coming up. We are delighted to have a witness of your prestige.

Mr. FISHER. Thank you.

[The statement follows:]

STATEMENT BY ROY M. FISHER, PROFESSOR AND DEAN EMERITUS, UNIVERSITY OF MISSOURI SCHOOL OF JOURNALISM

I appreciate the opportunity to appear before you to discuss the proposed repeal of the Fairness Doctrine, as outlined in Senate Bill 1917. I speak to you from my experience in both the print and broadcast media, and as dean of the school of journalism at the University of Missouri. My newspaper experience was primarily with the late Chicago Daily News, where I served in various capacities, from police reporter to editor-in chief. My broadcast experience came primarily as the executive responsible for the news and public affairs programming at the University's two stations, KOMU-TV, which is a commercial, network affiliated station serving central Missouri, and KBIA, a public radio station in the same market.

There has been concern from some of my journalism colleagues that the Fairness Doctine infringes upon our First Amendment rights. The U.S. Supreme Court has held otherwise, but never-the-less that concern persists, and is, in fact, restated in the findings pertaining to S. bill 1917. I believe such a finding distorts the very purposes of the Fairness Doctrine, ignores the circumstances under which the Doctrine came into being, and flouts the experiences we have had under the Fairness Doctrine during the past 50 years.

The Fairness Doctrine's antecedents go back even further than that. In 1926, then Secretary of Commerce Herbert Hoover remarked to a colleague that he hoped that the marvelous new medium of radio would be become more than an entertainment and advertising medium, that it would someday be a major force for enlightenment, as well. From that hope came the beginnings of the Fairness Doctrine. Far from being an intrusion upon First Amendment rights, it was an exhortation to the broadcast industry to use those First Amendment rights. It was of course, more than an exhortation, it was a mandate, saying that any company granted a license to broadcast would be expected to devote a reasonable amount of time to the discussion of controversial issues.

The Fairness Doctrine does not prescribe how this is to be done, excepting that the broadcaster should attempt to report all sides of an issue—in other words, to be fair. That's not much to ask. But therein lies the difference between freedom and tyranny. That a mass communications medium should be obligated to report all sides of a dispute is a mandate that could be made only in a country that believes deeply in the democratic processes.

For half a century our revolutionary doctrine has worked pretty well. Rarely, if ever, has anyone lost his license because of the Fairness Doctrine. And the fact that our broadcasters today routinely attempt to tell all sides of an issue distinguishes them from almost every other broadcasting system in the world. Now it is argued that we have learned our lessons so well in this country that we no longer need the doctrine. But the future has a bad memory. As the competition for world resources becomes more bitter in the years ahead, as our society becomes more polarized, as our communications become more fragmented, the social and economic pressure against the reporting of maverick ideas and opinions will test the metal of our democracy. In such a time, the Fairness Doctrine will provide a needed shelter for those who would tell all sides fairly.

But as important as the "fairness" portion of this doctrine is, even more important is the part that says that a licensee must exercise his First Amendment rights, that he must devote a reasonable amount of his broadcast time to the discussion of controversial issues. This has been pointed out by some of my journalistic colleagues as an intrusion upon the rights of ownership, although, of course, the licensee does not own the airways. It has been pointed out that this is an intrusion of the licensee's First Amendment rights. They ask, "Why can't the broadcasters be as free as the newspapers?"

As a matter of fact, newspapers in this country have been expected to devote a reasonable amount of their space to the public interest and are rewarded when they do. In order to qualify for a second class mailing permit, newspapers must devote at least twenty-five percent of their space (you can read that "time") to news and editorial content. The second-class permit is, of course, a government subsidy based upon the concept that the electorate in a democracy must be informed. It is strikingly similar to the essential part of the Fairness Doctrine. Similar subsidies are granted also to books and magazines, for the same purpose. While some newspapers could operate without such a subsidy, it was once crucial to nearly all publications. It remains crucial today for those whose primary means of delivery is the postal service.

So the Communications Act had a perfectly valid precedent when it attached a standard of service to a broadcast license. A postal subsidy would have had no relevance for broadcasters, of course. So what better approach than to let would-be broadcasters know from the very beginning that they would be expected to serve the public interest, convenience, and necessity. If a better approach to that goal becomes available, so be it. But until then, the public interest demands that the broadcasters go through the motions and the paperwork that is required to satisfy the FCC that the license is being operated in the public interest.

There is one more factor which influences the broadcast executives' judgment in matters of fairness which I would like to touch upon. Broadcasters, because of the very nature of their medium, find it more difficult and more expensive to comply with standards of fullness and fairness. Newspapers are in the business of selling newsprint with words and pictures printed on it. The broadcasters sell time with words and/or pictures inserted into it. If a newspaper needs more space to cover all sides of a controversial issue, it can add more newsprint. But time for a broadcaster is a finite property. Something else must go if the broadcaster is taxed to provide more complete coverage of an issue. Hence the temptation of the broadcaster to cover only part of an issue is great.

But there is a more serious aspect to the broadcaster's problem than the mere limitation of time. A full discussion of all sides of a controversy not only takes more time but it also heightens the likelihood that listeners will get tired of the subject and switch their dials to another station. News directors know all about listeners' attention spans and program accordingly. As any editor knows, not every story he prints or broadcasts will interest every reader. In fact, readership surveys of newspapers show that it is an unusual story that commands the interests of even half the total newspaper readship. Similarly, broadcasters find themselves speaking to an audience, most of whom are not interested in the immediate subject of the newscast. That explains the 20 or 30 second news items. For 20 or 30 seconds, those readers will probably stay with the station, anticipating that the next item will be better. In other words, a broadcast news audience is held together only by the anticipation that something good will be coming up next. And sometimes, fortunately, it does. This editing phenomenon holds good even for all-news stations, which theoretically have all the time at their disposal they could wish. But instead of using the extra time to provide deeper and broader coverage of an issue, they simply rebroadcast the same short-item format, hour after hour. It is the fear of losing audience—not of losing their licenses—that chills controversy on stations which depend for their survival so heavily on audience numbers.

I say this not in criticism but in explanation. The Fairness Doctrine stands as a troublesome conscience before news executives who are striving to wring the last tenth of a percent out of the ratings. Yet, is not that the cost of doing business in a free society?

I have one final point. Some of my fellow journalists have warned of the danger that the Fairness Doctrine may be used by government to force conformity to government wishes. A time or so, such efforts have, indeed, been tried. But government's efforts have always backfired. Our system of divided powers has been demonstrated to be an effective shield for freedom. More dangerous, in my opinion, is the chilling effect that social and economic pressures exert against our media. These are daily, constant, and sometimes very troublesome pressures. Against these pressures, a doctrine that requires that all sides be covered farily is a welcome protection for the news director intent upon living up to the highest standards of his profession. That perhaps explains why the working journalist in the newsroom is so much more sanguine about the Fairness Doctrine than are the executives in the front office.

The CHAIRMAN. Our next witnesses will be on a panel, I might say to the panelists, please insert your statements in the record in full, because the panelists will each be held to 5 minutes.

Robert Gurss, Samuel Simon, Reed Irvine, Elaine Donnelly, if she's here—she had weather problems getting out of Chicago earlier—and Ronald Cathell.

Is everybody here?

I might say to the panelists the 5-minute limitation is not designed because you are opponents of the legislation. The same rule will apply to all panelists.

I discovered in the past we have varied between allowing individual witnesses 5 and 10 minutes and panelists 5 minutes a piece. Organizations quickly realized that they can have panels of 15 people and take 5 minutes a piece and say a great deal. As a result we had to put some limitation on the numbers of people on the panel and the time.

Mr. Gurss, do you want to go first?

STATEMENTS OF ROBERT M. GURSS, ATTORNEY, MEDIA ACCESS PROJECT; SAMUEL A. SIMON, EXECUTIVE DIRECTOR, TELECOMMUNICATIONS RESEARCH AND ACTION CENTER; REED IRVINE, ACCURACY IN MEDIA; AND RONALD W. CATHELL, DIRECTOR OF MEDIA AND COMMUNICATIONS, NATIONAL ASSOCIATION OF ARAB AMERICANS

Mr. GURSS. Thank you, Mr. Chairman.

I strongly oppose the repeal of section 315. Our democratic system requires the maintenance of an informed electorate. Today, television and radio serve as the primary source of information. Therefore, we need mechanisms such as the political broadcasting rules and the fairness doctrine to insure that the public receives sufficient information to make intelligent decisions in the voting booth.

Section 315 serves the public's need to receive information and at the same time respects the important first amendment rights of broadcasters. It provides a largely self-enforcing mechanism which stresses citizen broadcaster conciliation as a prerequisite to any FCC involvement. This restricts governmental interference in the broadcasters' operations and encourages the development of beneficial ongoing relationships between broadcasters and members of their local community.

Judging by the witness list for today's hearing, you will hear the protests of several licensees who have been involved in fairness doctrine and political broadcasting complaints. When listening to this testimony I hope the committee will remember that there is, of course, another side to each of these stories.

But even more important is the fact that these examples are the most extraordinary exceptions to a general rule. Rarely are licensees subjected to bona fide section 315 complaints. In 1981 the FCC made only eight findings adverse to broadcast licensees involving section 315, and that includes lowest unit rate complaints. There are almost 10,000 broadcast licensees. This minuscule number of successful complaints compared to the number of broadcasters is a small price to pay for the significant benefits of section 315.

Our constitutional democracy frequently requires the balancing of legitimate and competing civil liberty interests. Section 315 successfully reconciles the first amendment rights of the public and those of broadcast licensees. Congress, the courts and the Commission have developed a time-tested administrative scheme which gives great deference to the needs of broadcasters. However, when there is a legitimate dispute, the Supreme Court has held unanimously that it is the public's right to receive information, not the right of the broadcaster, which is paramount.

Broadcasters receive free of charge a Government-granted monopoly over a public resource, the airwaves. The *Red Lion* decision held that it is reasonable to condition an exclusively held license upon the providing of a minimal level of public service. Thus, broadcasters must provide a reasonably balanced presentation of controversial issues as well as equal opportunities for legally qualified candidates to express their views to the electorate.

This public trusteeship rests in part upon the concept of spectrum scarcity. This committee has frequently heard the claim that scarcity of broadcast frequencies no longer exists. In fact, scarcity is a very real and continuing problem.

Opponents of section 315 argue that there is now an abundance of sources of information provided by new technologies. Yet, most are years from even minimal market penetration. Some are still on the drawing boards. Indeed, some services such as cable are growing slower than many people expected, and other services such as STV are on the decline.

Most Americans currently receive no video informational programing other than traditional over-the-air broadcasting, and they are unlikely to be served by alternative services in the near or even distant future.

Critics of scarcity also note the increase in traditional broadcast outlets since 1953, but as my written testimony shows, such growth has been greatly overstated. However, the most important point is that scarcity is properly measured by the demand for available outlets and not by the number of operating stations.

There can be no doubt there are still not enough frequency allocations to go around. Broadcast stations are currently selling at prices far beyond the value of their physical property and good will. In the rare instances where the FCC opens up new services such as low power TV, it is inundated with mutually exclusive applications. Scarcity clearly still exists.

For these reasons, Mr. Chairman, I believe that section 315 continues to be a necessary and highly beneficial component of our marketplace of ideas.

[The statement follows:]

STATEMENT OF ROBERT M. GURSS, MEDIA ACCESS PROJECT

I am staff attorney for the Media Access Project, a public interest law firm specializing in telecommunications matters. MAP is not a membership organization, and generally does not appear before agencies or the courts in its own behalf, but on behalf of citizens' groups and other organizations seeking to vindicate the public's right to receive exposure to the broadest possible range of ideas on issues of public import. In accepting your kind invitation to testify today, Mr. Chairman, I am presenting my own views. However, since my position is based on perspectives gained in MAP's representation of the interests of its broad clientele, this testimony generally reflects the experiences of those groups.

The current provisions of Sections 312(a)(6), 312(a)(7) and 315 of the Communications Act may not be perfect.[1] Indeed, we have been willing to discuss alternative mechanisms, but the FCC has refused to consider these.[2] But S. 1917 goes all the way, and offers no balancing of rights and no protection for the public. For example, it would repeal the current provision permitting the FCC to revoke a license for a broadcaster found to have used his or her station for fraudulent purposes. It is rather outrageous to suggest that a federal licensee given an exclusion trusteeship should not be relieved of its privilege upon abusing the property in violation of the criminal code.

The main focus of S. 1917 is repeal of Section 315. I disagree. The fairness doctrine and the equal opportunities provisions embodied in Section 315 of the Communications Act[3] respect the fragile balance of competing interests and needs of broadcasters and the public. This has provided at least some insurance for the public, whose right to receive information demands the fullest protection of the First Amendment to the Constitution. Yet, this extraordinarily difficult accomplishment has been achieved through a largely self-enforcing administrative mechanism which is minimally intrusive into the editorial processes of the broadcaster. Section 315 has had virtually no day-to-day impact on the operations of broadcast licensees, affording significant protection at almost no cost. By emphasizing citizen-broadcaster conciliation as a pre-requisite to any FCC involvement, Section 315 as administered has actually served in practice to restrict direct governmental interference in the operations of broadcast licensees, and encouraged the development of ongoing relationships between broadcasters and members of their community of service. This, in turn, often serves to create a forum which actually prevents misunderstandings and eliminates disputes before they arise.

The longstanding opposition of many, but by no means all, broadcasters and journalists is understandable. No one appreciates second guessing of his or her work product. But the hands-off approach used in fairness doctrine enforcement is a narrowly tailored, judicially approved scheme which, contrary to the apparent premises of S. 1917, does not constitute censorship. The fairness doctrine is affirmative; it sometimes requires additional programming, but never commands condemnation of past or future programming.

Judging by the witness list for today's hearing, you will hear the laments of several licensees who have been the subject of fairness doctrine and equal opportunities complaints. When listening to this testimony, I hope the Committee will remember that there is, of course, another side to each of these stories—indeed, that is why we have a fairness doctrine. But even more important is the fact that these examples are the most extraordinary exceptions to a general rule. Only in the rarest of circumstances is a licensee subjected to a bona fide Section 315 complaint, much less found to have been in violation.

When I refer to "the rarest of circumstances" I mean that it is highly unlikely that a broadcast licensee will ever be found to have violated Section 315. In 1981, the FCC made only eight findings adverse to broadcast licensees involving not only Section 315 but also the reasonable access and lowest unit rate provisions which would be repealed by S. 1917.[4] As unfortunate as it may be that any such determinations must be made, the incidence of federal involvement represented by fewer than a dozen violations from among almost 10,000 licensees is a small price to pay for the significant benefit of public protection, and public confidence in the broadcast system attained by Section 315.[5]

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[1] I would not find any harm in deleting the inclusion of 18 U.S.C. § 1304 (broadcast of lottery information) or 18 U.S.C. § 1464 (broadcast of obscene, indecent or profane language) in Section 312(a)(6).

[2] For example, Professor Henry Geller suggested an alternative access mechanism which the FCC refused to consider until a Court ordered it to do so. *National Citizens Committee for Broadcasting* v. *FCC* 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 2820 (1978). Thereafter, the FCC declined to adopt the Geller proposal. 74 FCC2d 164 (1979).

[3] From time to time, desperate opponents of the fairness doctrine have resurrected the notion that the fairness doctrine was not in fact codified in 1959 amendments to Section 315 contained in Public Law 86–274. This position lacks historical support, and contravenes the often expressed views and holdings of the FCC, the Courts and legal scholars. See, e.g., Letter from Commissioner Richard E. Wiley to the Honorable William Proxmire, May 29, 1973. Whatever else may be accomplished by S. 1917, it plainly evidences an understanding of the need for Congressional action to repeal the fairness doctrine, if there is to be a repeal.

[4] Memorandum from Milton O. Gross, Chief, Fairness/Political Broadcasting Branch (FCC), to Jackson F. Lee, "Answers to House Telecommunication Subcommittee Questions." *See also Democratic National Committee* v. *FCC*, No. 82–1872 (D.C. Cir. September 27, 1983), Slip Op. at 14, n.5.

Among the most difficult of challenges in a democracy is the balancing of legitimate and competing civil liberties interests, such as the individual's right to privacy versus the public's right to know, and the need to protect confidential sources versus the litigant's right to confront an accuser. So, too, with Section 315 is there a need to balance different interests. In this case, however, we have developed a time-tested administrative scheme which gives deference to the needs of the broadcaster, and shields licensees from even having to know about the vast preponderance of complaints, much less having to answer them. But in the event that there is a legitimate dispute, the U.S. Supreme Court has decisively struck the balance in favor of the public's right to receive information. The unanimous holding of the *Red Lion* case [6] is that it is the right of the listerner and not that of the broadcaster which is paramount. The First Amendment exists to serve the needs of the electorate, and broadcasters receive a license giving monopoly rights in exchange for commitments to public service. Section 315 compliance is, in the words of Chief Justice Burger, "a sine qua non of every licensee." [7]

The *Red Lion* holding has been repeatedly reaffirmed by the Supreme Court, both before and after the *Tornillo* case [8] which, some fairness doctrine opponents have suggested, signaled a retreat from *Red Lion*. In fact, however, the *Red Lion* case is as strong today as it was at the time of its issuance. It is premised on the idea that the broadcast media are different from other media, and in the words of a later Supreme Court decision decided in favor of broadcasters, "pose unique and special problems not present in the traditional free speech case." [9]

Over the last several years, the Committee has heard numerous presentations suggesting that the scarcity of broadcast frequencies upon which *Red Lion* is premised no longer exists. While I do not believe that scarcity is the only constitutional rationale for Section 315, the fact is that scarcity is a very real and continuing phenomenon. As the U.S. Supreme Court has emphasized,[10] *scarcity is a function of demand, not merely absolute abundance.*[11] The purest measure of broadcast frequency scarcity is the sales price of radio and television stations, which far exceeds the value of physical plant and good will. These prices have gone up, and up, and up. VHF television licenses in major markets are now worth hundreds of millions of dollars. Channel 5 in Boston was sold a few years ago for almost a quarter of a billion dollars. More recently, Metromedia paid almost as much for a UHF station in Chicago. Radio prices have also far exceeded the rate of inflation.

Nor is there even a very real increase in the relative number of broadcast outlets available to the average American. I have attached to this testimony a passage from comments recently submitted to the FCC on behalf of a group of civil rights and media reform organizations[12] in connection with the proposed modification of the FCC's so-called "7-7-7" rule on broadcast ownership. The comments demonstrate that the number of broadcast outlets has not significantly increased when increases in population is taken into account. For example, the number of AM stations per capita increased only 31 percent from 1953 to 1983, and the number of commercial VHF TV stations increased only 25 percent from 1956 to 1982. Even this increase greatly exaggerates the gain, because many new stations have offered the first or second service to a community. Thus, of the 2,262 new AM stations since 1953, 1,131 are in cities which previously had no service.

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[5] During a 4-year period examined by Prof. Steven J. Simmons, a fairness doctrine critic, the FCC received 49,801 letters categorized as fairness complaints. But only 244 of these, about one-half of 1 percent, were deemed prima facie complaints requiring notification of the licensee. Only about one-fourth of these inquiries resulted in adverse rulings. In other words, the odds of an adverse action against a station is less than 1 in 800 per year. Simmons, "The Fairness Doctrine and the Media" (1978).

[6] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

[7] Justice Burger was at the time sitting on the U.S. Court of Appeals for the D.C. Circuit. The quotation is from *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1009 (D.C. Cir. 1969).

[8] *Miami Herald* v. *Tornillo*, 418 U.S. 241 (1974). *See CBS, Inc.* v. *FCC*, 453 U.S. 367 (1981).

[9] *Columbia Broadcasting Sys.* v. *Democratic National Committee*, 412 U.S. 94, 101 (1973).

[10] *Red Lion*, 395 U.S. at 388–89.

[11] 172 parties recently filed applications for a potentially available VHF station in Los Angeles.

[12] Black Citizens for Fair Media, League of United Latin American Citizens, NAACP, National Association for Better Broadcasting, National Conference of Black Lawyers Communications Task Force and Telecommunications Research and Action Center.

Media Access Project has pressed for the creation of new outlets. We welcome diversity, even where the FCC has been timorous (as in the case of VHF "drop-ins" and 9kH AM spacing), or lackadaisical (as with low power TV). More is clearly better, but we don't really have many more stations—at least not yet.

Another inappropriate claim offered to justify repeal of Section 315 is the development of alternative program sources. Here again, we welcome all of these long awaited benefits of technology, however attenuated they are by the unfortunate failure of the FCC and other bodies to encourage minority ownership and to develop meaningful structural regulations on crossownership and multiple ownership. But all program sources are not fungible; most pay television is long-form entertainment, not news and other information comparable to current broadcast services. And most of these new services are nationally, not locally programmed, and do not offer significant numbers of viewpoints to the public on local issues. But even more important here is the fact that these new services are not present now in significant numbers, and may never be. The comments attached to this testimony discuss how cable, STV and other services are falling far short of many expectations. STV stations are going off the air much faster than new ones are being created. The January 19, 1984 issue of Electronic Media predicts "still more casualties among the pay and basic program networks." It quotes a new market research report which projects only 2 national pay movie channels by 1993, and "10 or 12" satellite delivered cable services surviving from among the 40 or 50 now available. The same issue contains a story about the "lackluster response" to direct broadcast satellite service.

While I do not believe that an abundance of new program sources eliminates the continuing need for Section 315, the simple truth is that no one knows for sure what the future has in store for the American public. S. 1917 proceeds from a wholly unjustified assumption about the number and nature of new media sources. It is legislation whose time may never come, but it certainly has not come yet.

The CHAIRMAN. Thank you very much.

Next we will take Mr. Simon.

Mr. SIMON. Mr. Chairman, thank you very much for having me here. I will briefly summarize my written testimony and hopefully perhaps dramatize some of the points in it.

I must say it was much more appealing to work with you, Chairman Packwood, when we both supported the important telephone legislation than having to deal with our major and basic differences over the Fairness Doctrine issue.

S. 1917 proposes the repeal of the Fairness Doctrine, section 315, equal opportunities, and Section 312(a)(7). It is premised on a finding in section 2, number 2, that "scarcity of outlets in telecommunications or in electronics communications no longer exist."

It is my view, Mr. Chairman, that that finding is simply unfounded. Unfortunately, TRAC was not invited to participate in your earlier hearings on scarcity, and the report produced as a result of those hearings reflects the absence not only of myself but others who hold contrary viewpoints.

That scarcity does exist, both in fact and as a matter of law, is indisputable. There are more people wanting to use the electronic spectrum who both have the technical and economic ability to do so than there are outlets. The reality, Mr. Chairman, is that we are all potential broadcasters.

There is a phenomenon in the United States that has not been taken into account in your prior hearings or, indeed, to my knowledge in Congress today. The phenomenon is an access explosion in the United States. We have attempted to educate Members of Congress by holding what we call a Media Access Showcase in the Rayburn House Office Building bringing in some of the citizens-produced broadcast materials.

We list in the written testimony a few of the many new centers that are training people to become broadcasters. Of course, as the prior witness mentioned, perhaps the best example, the most dramatic example of scarcity today is in low-power television, and the fact that there are five, probably now close to 10,000 potential broadcasters lined up at the FCC, including an organization I am associated with, Citizens TV System, asking to use the new outlets, the new spectrum availability. yet, we are forced to wait, while the FCC tries to allocate the frequencies, which raises or moves into the issue of what I call legal scarcity.

The key issue this committee needs to be looking at is the exclusive licensing of the electronic spectrum. The Fairness Doctrine stems from and the *Red Lion* case is premised on the fact that the U.S. Government licenses people to speak electronically. It is that license that is a fundamental distinction between the print and electronic media.

I would like to take just a minute and give an example. I have written, produced, and published this book. [Indicating]. I did not need a governmental license to do so. We have been able to xerox it, print it, distribute it, all without Government approval. The same precise words that are in that book are on this videotape. I cannot put this on Channel 7 in the Washington market or on any electronic spectrum without governmental license.

Mr. Chairman, if you want to repeal the Fairness Doctrine, first get rid of the Government licensing function. Then I as any other citizen in the United States, all of whom have the same rights or should have the same rights to disseminate it and speak electronically.

The CHAIRMAN. Let me ask you a question. Would you support that?

Mr. SIMON. I would, yes. As a matter of fact, in our testimony I outline several different proposals to address the issue of the exclusivity of the license. I do not think we have to get rid of licensing entirely. I think what we have to do is develope an alternative to the Fairness Doctrine, if we want to explore alternatives, and I say in my testimony we are more than open to work with you and your committee to look at real alternatives to the exclusivity of the license as an alternative to the Fairness Doctrine.

The CHAIRMAN. I wanted to pose the idea—and no one was enthusiastic about it—that we get rid of licensing, even as to frequencies. We could then pass a quintuple damage statute for anyone who interferes with someone else's frequency, and we just throw open the spectrum to the highest bidder. Then you would have no licensing.

Mr. SIMON. There are some very thoughtful proposals. I was on a panel recently for the CATO Institute on whether to give private property rights in the spectrum. I think there are fundamental public policy questions associated with a plan like that. It is one we are willing to discuss and look at, and some variation of that combined with some sort of public access requirement might be workable.

We tend to look at the development of cable television as a model. Cable provides channels, public access channels. We list in our testimony an idea for public access radio to give the public some part of that. We also have access options for television recommended to your consideration.

Thank you very much.

The **Chairman**. Thank you.

Next we will take Mr. Irvine.

Mr. **Irvine**. Mr. Chairman, I represent Accuracy in Media, an organization with some 32,000 members around the country, most of whom I think would subscribe to what I will say today.

We oppose the legislation proposed. We think it poses a serious danger to the proper functioning of our democratic system. No doubt you and other opponents of this move are motivated by noble intentions, but it is clear some of those who have led the effort to remove all fairness constraints are thinking of their own selfish interests, not the welfare of the Nation.

I refer to powerful figures within the broadcast industry, particularly CBS and NBC, which have long campaigned to free themselves for the mild and reasonable restraints imposed on them in the name of fairness and equitable treatment of candidates for office.

Mr. Chairman, there is not the slightest evidence that these restraints have in any way impinged on the first amendment rights of the owners and employees of radio and television networks or individual broadcasters. They are as free as you or I to state their views on issues of the day. And figures such as the chairmen of the boards of these companies and the principal figures in their news operations are in a favored position to obtain publicity for their opinions.

What apparently bothers them is the modest requirement that they afford those who hold contrary views on controversial issues of public importance be given an even token amount of time to express their views. Those who hold contrary views may represent the overwhelming majority of the American people or they may represent an unpopular minority. It matters not to the advocates of uninhibited power for broadcasters. They alone are to be the arbiters of what the American people see and hear over the most powerful communications medium ever devised—television.

They tell us they ought to have the same freedom from fairness as do the publishers of newspapers and magazines because they are no different. They are not being honest. Last year I was one of three guests on the Phil Donahue program, a syndicated show. As a result of that appearance, Accuracy in Media received over 14,000 letters from all over the country. Last year we spent $72,000 for a full-page ad in the largest circulation newspaper in the country, the Wall Street Journal. We received a few hundred responses to that ad.

The impact of the print media cannot be compared with television in either the range or intensity of its penetration. This is being reflected in the demise of many of our once powerful and profitable newspapers and magazines. Those who control television have it in their power to exercise more control over this country than does the Congress of the United States. Indeed, the power to control television uninhibited by any fairness requirements poses the danger of making Congress itself subservient to those who own and control television.

We saw that power demonstrated in 1971 when CBS used its powers to get the House of Representatives to defeat the recommendation of the House Commerce Committee that the president of CBS be cited for contempt of Congress. And that was in the days when the FCC was still enforcing the Fairness Doctrine.

What happens when there is no longer any fairness requirement, no equal time requirement for candidates for office, no obligation to permit a person subjected to a personal attack on the air the opportunity to reply, and when any broadcaster will be free to make in-kind contributions of editorial support to its favorite political candidates.

We have made great efforts to make the political process less susceptible to influence by those with deep pockets. The legislation you are now considering will make nonsense of those efforts. Candidates today want money to buy television time. What this legislation would do would be cut out the middlemen, those individuals and groups who can provide candidates with the funds they need for access to TV. It would give the owners of television facilities the power to decide who will and will not get time. It will give them the power to make or break candidates free of any concern about the rulings of the Federal Election Commission. It will greatly enhance the value of broadcast licenses at the same time the FCC is liberalizing the rules to permit individuals or companies to own a greater number of stations. At the same time the broadcasters are being given greater power by being allowed to operate solely to serve their own selfish interest, not the public convenience and necessity, they are to be allowed to further enhance their power by bringing more stations under their control.

It is little wonder that groups on both sides of the political spectrum have joined in opposing this bill and the efforts of the FCC to abrogate the Fairness Doctrine by ignoring it.

What Congress should do is send a clear message to the FCC at the earliest opportunity and make it clear that it rejects the efforts of the broadcasters to grab greater power for themselves, ostensibly in name of promoting greater freedom. The freedom they promote is strictly their own, not the freedom of the American people to hear all sides of controversial issues and to elect candidates to office on the basis of a free and fair debate.

Thank you.

The CHAIRMAN. Thank you.

Mr. Cathell.

Mr. CATHELL. Yes. Mr. Chairman, first we would like to thank you for inviting us to testify.

As the principal political organization representing 3 million Americans of Arab descent across the United States, the National Association of Arab Americans is deeply concerned about safeguarding freedom of speech and insuring that all views be afforded equal access to all media.

It is our opinion that S. 1917 would have an ultimate effect of limiting free speech to the detriment of the public welfare. Our opposition to the bill is based both on principle and on our practical experience in the exercise of the Fairness Doctrine which this bill would ultimately repeal.

We take exceptions to many of the findings in the bill. We believe many are invalid and therefore cannot serve as the basis for recommendations for amendments to the Communications Act of 1934.

We have challenged a number of these findings in detail in our written testimony. We believe the findings could even be unconstitutional. Therefore, we recommend that the question of the constitutionality be clarified before the bill proceeds.

Regarding our practical experience as a basis for opposing this bill, we have learned that without the Fairness Doctrine it is nearly impossible for some groups to be heard over the airwaves. Because of the difficulty in obtaining access to regularly scheduled programing, the NAAA, our organization, found it necessary to air its views through paid advertisements.

In the past few years the NAAA has engaged in three major media advertising campaigns that have yielded unique, possibly unprecedented experiences that impact on the First Amendment, freedom of speech and the Fairness Doctrine.

We learned that the broadcast medium does not guarantee freedom of speech for all people. We learned there are no provisions that guarantee access to airwaves. We learned that broadcasters generally prefer not to air controversial issues that are believed to be a minority view.

As a result of these experiences, it became absolutely clear that without the Fairness Doctrine, we stood almost no chance of being allowed to present our views to the public via the airwaves.

The reasons cited by broadcasters in refusing our ads were consistent. In order of predominance the reasons were, No. one, the ad was too controversial, the issue was too hot for them to handle; No. two, the station's standing policy was not to accept any editorial advertising; No. three, the ads would run afoul of or trigger the Fairness Doctrine and require the broadcaster automatically to give equal time to opposing views for free. We found such a misunderstanding of the Fairness Doctrine to be prevalent. No. four, the stations feared reprisals by advertisers with opposing views who threatened to cancel their accounts if our ads were aired. Generally, the larger stations with sufficient advertising rejected our ads, whereas smaller stations with limited advertising were readily accepted.

The reasons cited for acceptance were also consistent. First, they stated that important issues should be addressed before the public; second, the Fairness Doctrine requires that controversial issues be aired and opposing views be given an opportunity to respond.

So we have seen how the Fairness Doctrine is used both to accept and reject editorial advertising. This does not reflect a flaw in the Fairness Doctrine, however; rather, it reflects broadcasters' widespread misunderstanding of the Fairness Doctrine.

The Fairness Doctrine worked exceptionally well for us when the broadcaster exhibited an accurate understanding of it and of his responsibility as a public trustee. For example, two stations in Washington, D.C. handled our ads in an exemplary manner.

WTOP accepted our ad for both reasons just described. They then actively sought out an opposing view which they gave near equal time during very similar programing in which our ad appeared.

The station also aired an editorial commentary stating the importance of offering opposing views on the same issue.

WRC-AM ran our announcements without providing corresponding commercial air time to the opposing view, but scheduled an interview call-in program featuring spokesmen for the other side.

We believe the welfare of the public was best served by the kind of conduct exhibited by WRC and WTOP. Their handling of the ads was based upon their accurate understanding of the Fairness Doctrine and their sense of responsibility as broadcasters and public trustees.

In conclusion, the NAAA strongly opposes S. 1917 because the bill would eradicate over 50 years of debate and an enormous body of carefully agreed upon rules for safeguarding the First Amendment rights of the public involving the broadcast media.

So long as the Government retains the authority to issue licenses to broadcasters, its first responsibility lies in ensuring that the welfare of the public is served. While the Fairness Doctrine does not regulate the content of information broadcast, it does create accountability on the part of the broadcasters to air controversial issues of public importance and offer opportunities for opposing views.

Without the Fairness Doctrine, NAAA and other organizations might never be allowed access to the airwaves. Our experience shows the Fairness Doctrine works when it is accurately understood. Without the Fairness Doctrine, broadcasters would be vulnerable to sympathizing more closely with financially influential groups or individuals and their ideas.

If successful, S. 1917 would eliminate a process of checks and balances between Government and broadcasters that has worked extremely well for 50 years. Without some accountability for the Government, broadcasters may have no interest in fairness or balance.

A repeal of the Fairness Doctrine could usher in a new era in American broadcast journalism similar to the sensational yellow journalism era of print media experienced in the 1920s and 1930s. Without the Fairness Doctrine, the Government would afford to broadcasters an absolute and unrestricted right to advance their views to the exclusion of those of their less privileged citizens.

The CHAIRMAN. I must ask you to draw to a conclusion, Mr. Cathell.

Mr. CATHELL. Let me get right to our recommendations. We recommend two points.

First, we recommend that the Fairness Doctrine be strengthened and more effectively enforced. We recommend that the FCC take the initiative to provide each broadcaster with, (A) a simplified and basic description of the Fairness Doctrine, and (B) a more detailed analysis in practical terms of the Fairness Doctrine, and to ensure that broadcasters read and understand A and B, we would make the second recommendation, that the FCC should require that upon license renewal, each broadcaster be administered a test on the basics of the Fairness Doctrine. Just as a driver must pass a test to renew his license, so should broadcasters prove their proficiency in understanding their responsibilities and obligations as public trustees.

Thank you for this opportunity to present our testimony.

[The statement follows:]

STATEMENT OF RONALD W. CATHELL, DIRECTOR, MEDIA AND COMMUNICATIONS, NATIONAL ASSOCIATION OF ARAB AMERICANS

The National Association of Arab Americans welcomes the opportunity to present testimony to this committee concerning Senate Bill 1917 (S. 1917) introduced by Senator Robert Packwood (R-OR). As the principal political organization representing three million Americans of Arab descent across the United States, the National Association of Arab Americans is deeply concerned about safeguarding freedom of speech and ensuring that all views—whether in the majority or minority of public opinion—be afforded equal access to all media.

It is our opinion that S. 1917 ("Freedom of Expression Act of 1983"), while offering an attractively simplistic ideology about how to maintain unrestricted and free speech within the broadcast medium, would have an ultimate effect of limiting free speech to the detriment of the public welfare. The NAAA strongly opposes the adoption of S. 1917.

We will address our concerns as follows:

I. NAAA Challenges to Premises and Assumptions in S. 1917

II. NAAA's Unique Experience in Paid Editorial Advertising on Radio

III. Conclusion and Recommendations.

I. NAAA CHALLENGES TO PREMISES AND ASSUMPTIONS IN S. 1917

S. 1917 bases its recommendations for amendments to the Communications Act of 1934 on six "Findings."

"Findings" No. (2) states: "There no longer is a scarcity of outlets for electronic communications." This assumption is inconsistent with previous and still current findings of the Supreme Court. In "Red Lion Broadcasting Co. v. FCC," 395 U.S. 367 (1969), Justice Byron R. White defined the "scarcity factor" as the basis for government involvement and licensing. The scarcity principle must be measured in terms of the number of persons who wish to broadcast and the availability of frequencies. In his words, there are still "substantially more individuals who want to broadcast than there are frequencies to allocate." Until that changes, the scarcity factor rule is still valid. The arguments in S. 1917 fail to refute that Supreme Court finding.

"Findings" No. (3) states: "The electronic media should be accorded the same treatment as the printed press." This opinion is predicated upon the assumption in "Findings" No. (2) which is invalid. Over 50 years of experience have found the broadcast medium to be distinctly different in nature than the print medium. During the first few years of broadcasting in America, chaos ensued on the airwaves as broadcasters vied for control of frequencies. The federal government found it necessary to regulate frequencies and to issue licenses as the best means of ending the battles over the airwaves and serving the interests of the public

"Findings" No. (4) states: "Regulation of the content of information transmitted by the electronic media infringes upon the First Amendment rights of those media." While we agree completely that there should be no regulation of the content of information broadcast, the finding incorrectly presumes that such is already the case. Quite the contrary, nothing exists in the Communications Act or in the Fairness Doctrine which allows government to regulate the content of information. There are no restrictions on what can be broadcast. Furthermore, rather than limiting the content of information, the Communications Act and Fairness Doctrine require broadcasters to air full information, including opposing views. In "Associated Press v. United States" 326 U.S. 1, 20 (1945), the Supreme Court emphasized the affirmative aspects of the Communications Act and Fairness Doctrine in ensuring the exercise of the First Amendment. They found that the First Amendment "rests on the assumption that the widest possible dissemination of the information from diverse and antagonistic sources is essential to the welfare of the public. . . ." "Finding" No. (4) is inapplicable to the debate because it proffers an erroneous presumption.

"Findings" Nos. (5) and (6) are predicated upon "Finding" No. 4 and, therefore, are also inapplicable because they are based on an erroneous presumption.

II. NAAA'S UNIQUE EXPERIENCE IN PAID EDITORIAL ADVERTISING ON RADIO

NAAA found it necessary to attempt to air its views through paid advertisements because of the difficulty is obtaining access to regularly scheduled programming on issues of public concern.

In the past few years, NAAA has engaged in three major media advertising campaigns that have yielded unique, possibly unprecedented, experiences that impact on the First Amendment, freedom of speech, and the Fairness Doctrine. We learned that the broadcast medium does not guarantee freedom of speech to all people. We learned that there are no provisions that guarantee access to airwaves. We learned that broadcasters generally prefer not to air controversial issues that are believed to be a minority view. As a result of these experiences it became absolutely clear that without the Fairness Doctrine we stood almost no chance of being allowed to present our views to the public via the airwaves.

The pattern of denial to air our views was consistent in each of the three advertising campaigns.

Broadcasters rejected our ads at the ratio of five to one, that is, for each acceptance there were at least five denials. This ratio was consistent in each city with the exception of Baltimore, where 13 radio stations rejected our ads. None accepted. The reasons cited by broadcasters in refusing our ads were also consistent in each city. In order of predominance, the reasons were:

1. The ad was "too controversial;" the issue was simply too "hot" for them to handle. No further explanations were cited.
2. The station's standing policy was not to accept any editorial advertising.
3. The ads would "run afoul of" or "trigger" the Fairness Doctrine and require the broadcaster automatically to give "equal time" to opposing views for "free."
4. The Stations feared reprisals by advertisers with opposing views who threatened to cancel their accounts if our ad was aired.

(It should be noted that of over 65 radio stations contacted, only one refused to air the ad because the broadcaster considered it in "bad taste.")

Our first campaign in October 1982 went into four cities: Albany, New York; Little Rock, Arkansas; Topeka, Kansas; and San Mateo, California. We combined newspaper and radio ads to present our concern about pending foreign aid increases for Israel before Congress at a time immediately following Israel's invasion of Lebanon. Placing the newspaper ads presented no problems. Placing the radio ads, however, proved extremely difficult.

Generally, the larger stations with sufficient advertising rejected our ads. Smaller stations with limited advertising more readily accepted.

This was the case in Albany, Topeka, and Little Rock. In the San Mateo area, however, all four radio stations rejected our ads. This was the first time that we would be totally shut out of a community. Instead of accepting this form of blacklisting, we used our budget for radio to purchase a second newspaper ad in the San Mateo Times (see addendum No. 1). That we were shut out of radio in San Mateo prompted the Times to run an editorial, "Free Press Means Expression of Differing Views" (see addendum No. 2).

Our second advertising campaign was conducted in January 1983, in six cities of Pennsylvania: Pittsburgh, Philadelphia, Allentown, Wilkes-Barre, Lancaster, and Erie. Again, the issue raised in the ad was pending aid increases for Israel before Congress. The same pattern of acceptance/denial ensued, but a new development occurred. Of the 13 stations that accepted the ads, four stations canceled them after only a few days. They were scheduled to run a week. The reasons cited were nearly identical—pressure from community members opposed to the view expressed in the ad. One station's salesman was more specific. He told NAAA that a group of businessmen who advertised with the station and its sister TV station had called the radio station manager and threatened to cause the station to lose thousands of dollars in advertising revenue if our ads were not pulled immediately. (See addendum No. 3, Sunday Call-Chronicle of Allentown, article headlined "L.V. radio stations pull ads critical of U.S. aid to Israel"). Our ads were subsequently pulled. The three other stations cited similar reasons but in less detail.

Our November 1983 advertising campaign in Baltimore experienced similar problems. All 13 stations in the Baltimore area rejected our ads. Concern about offending certain elements of the community was the predominant reason for rejection of the ads. (See addendum No. 4, Baltimore Sun article headlined "City Radio Stations Turn Down Arab-American Lobby's Ads.") We moved our campaign to Washington, D.C., where we found four stations willing to accept the ads. Their reasons cited for acceptance were similar to the reasons cited by other stations in previous campaigns:

1. Important issues should be addressed before the public.
2. The Fairness Doctrine requires that "controversial" issues be aired and that opposing views be given an opportunity to respond.

Two stations in Washington, D.C. handled our ad in an exemplary manner.

WTOP-AM accepted our ad for both reasons cited above. They then actively sought an opposing view. After some effort, an opposing group ran a message of near equal time during very similar programming in which our ad ran. The station also aired an editorial commentary stating the importance of offering various and opposing views on a given issue.

WRC-AM ran our announcements without providing corresponding commerical airtime to the opposing view, but scheduled an interview/call-in program featuring spokesmen of the other side.

We believe the welfare of the public was best served by the kind of conduct exhibited by WRC and WTOP. Their handling of the ads was based upon their accurate understanding of the Fairness Doctrine and their sense of responsibility as broadcasters and public trustees.

III. CONCLUSIONS AND RECOMMENDATIONS

Conclusions

NAAA strongly opposes S. 1917 because the bill would eradicate over 50 years of debate and an enormous body of carefully agreed upon rules for safeguarding First Amendment rights of the public involving the broadcast medium. Based upon this body of rules and Supreme Court findings, there remain serious questions on the constitutionality of S. 1917 which should be addressed before the bill proceeds.

Nevertheless, so long as the government retains the authority to issue licenses to broadcasters, its first responsibility lies in ensuring that the welfare of the public is served. While the Fairness Doctrine does not regulate the content of information broadcast, it does create accountability on the part of broadcasters to air controversial issues of public importance and offer opportunities for opposing views. Without the Fairness Doctrine, NAAA and other organizations might never be allowed access to the airwaves. Our experience shows that the Fairness Doctrine works when it is accurately understood by broadcasters. Without the Fairness Doctrine, broadcasters would be vulnerable to sympathizing more closely with finanically influential groups or individuals and their ideas. The Fairness Doctrine provides the opportunity for lesser known beliefs and minority views to be heard.

If approved, S. 1917 would eliminate a process of checks and balances between government and broadcasters that has worked extremely well for over 50 years. Without some accountability to the government, broadcasters may have no interest in fairness or balance. A repeal of the Fairness Doctrine could usher in a new era in American broadcast journalism similar to the sensational "yellow journalism" era of print media experienced in the 1920s and 1930s. Without the Fairness Doctrine, the government would accord to broadcasters an absolute and unrestricted right to advance their own views to the exclusion of those of their less privileged fellow citizens. As defined in "Red Lion Broadcasting Co. v. FCC," "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."

Regarding NAAA's experiences, those stations which rejected our ads represent an attitude which, in the opinion of former FCC Commissioner Kenneth A. Cox, is completely inconsistent with the broadcaster's role as a public trustee. As he pointed out in "The FCC and the Future of Broadcast Journalism 1969–1970" which was published in the Survey of Broadcast Journalism, "[a]s a trustee for the public, a broadcaster must use his facilities to enlighten the public about the critical issues which it faces, and this obviously requires substantial effort and may involve presenting some viewpoints with which the licensee totally disagrees."

In the FCC "Fairness Doctrine and Public Interest Standards," Part III 1974, the FCC states regarding editorial advertising: "[w]e cannot believe that an application of fairness here would have any serious effect on station revenues." And, "[w]e believe that the Fairness Doctrine should be fully applicable to them [editorial advertisements]."

Furthermore, the FCC states: "[t]he advertiser may seek to play an obvious and meaningful role in public debate."

The NAAA has sought nothing more than to fulfill that meaningful role of creating active public debate. Because of difficulty in being accepted on regular programming of broadcasters, we reverted to paid advertisement believing this would ensure that our views were heard.

Even here our views were frequently rejected for two fundamental reasons:

1. The broacaster's inaccurate understanding of the Fairness Doctrine; and
2. The broadcaster's disregard for his responsibility as a public trustee.

Recommendations

The Fairness Doctrine should be strengthened and better enforced to remind broadcasters of their responsibility as public trustees. Two measures should be taken:

1. The FCC must take the initiative to provide each broadcaster with A) a simplified and basic description of the Fairness Doctrine, and B) a more detailed analysis in practical terms of the Fairness Doctrine. To ensure that broadcasters read and understand A and B,
2. The FCC should require that upon license renewal each broadcaster be administered a test on the basics of the Fairness Doctrine. Just as a driver must pass a test to renew his license, so should broadcasters prove their proficiency in understanding their responsibility and obligations as a public trustee.

The CHAIRMAN. Let me ask you a question. Does your objection go simply to broadcasting, or do you think all media should be compelled to take your ads if you present them?

Mr. CATHELL. All we are discussing here is the broadcast medium.

The CHAIRMAN. I understand that. When I was a young lawyer, one of my senior partners represented one of the Portland papers. This newspaper had a policy of not taking certain ads and the groups who wanted to place them were forever complaining. Should newspapers be allowed to do that?

Mr. CATHELL. Should newspapers be allowed to reject advertising?

The CHAIRMAN. Yes.

Mr. CATHELL. I think there should be some standards which would enable newspapers to reject advertising. I think if an ad were to promote anything of violence or——

The CHAIRMAN. Some of the ads they rejected were rejected as a matter of policy. They were not pornographic or violent ads. The newspaper just had a policy that it would not take certain kinds of ads.

Mr. CATHELL. I think that is within their rights. I would like to study it closer.

The CHAIRMAN. But that should not be within the rights of broadcasters?

Mr. CATHELL. I am not saying that broadcasters should have the right not to accept. What we are saying is, the broadcasters have an obligation to serve the public, to present controversial issues. In our case, what we were proposing was a controversial issue which we felt was of great importance to the public. More importantly, the fairness doctrine requires that opposing views to a controversial issue that has already been aired be given an opportunity also to be broadcast.

The CHAIRMAN. Should that same standard be applied to print? Should they be compelled to take ads contradictory to the ads they have already taken?

Mr. CATHELL. I think as a colleague here on the panel pointed out, there is a fundamental difference between print and broadcast, and as long as the Government will issue licenses, the Government has a responsibility to insure there is fairness. That does not exist with print.

Mr. IRVINE. May I comment on that, Mr. Chairman?

The **Chairman**. In just a minute. I want to finish here first.

You are basically coming to the question of licensing and scarcity. People use these concepts interchangeably on occasion. Is that what you are saying? Everyone cannot have a station, therefore we will impose on broadcasters a different requirement than we impose on newspapers?

Mr. **Cathell**. That is very close to what we are saying. We are saying as long as there is scarcity, as long as there is going to be licensing, there needs to be some mechanism to insure that the welfare of the public is served, and we believe the fairness doctrine does that, and that is why we oppose S. 1917, because it would eliminate that.

The **Chairman**. Let me ask you, if a radio or television station did not have to worry about the fairness doctrine, did not have to worry about whether someone would demand free time in response, would they not be more likely rather than less likely, to take your ads?

Mr. **Cathell**. Our experience shows that a broadcaster is unwilling to broadcast an issue which they believe is, as we pointed out, too controversial. They are concerned about revenues. They are concerned about maintaining accounts with major advertisers in their communities. If they feel in any way that by airing a controversial issue which does not sit well with the particular advertiser or the particular group of people in their community who pay for advertising, they are going to be more likely not to accept that minority controversial view.

The **Chairman**. All right. Let me ask you this, then. Nothing in the fairness doctrine as it exists today requires any radio station to take an ad.

Mr. **Cathell**. That is my understanding.

The **Chairman**. If they do take an ad, there are some ramifications which follow but initially they do not have to take any ad.

Mr. **Cathell**. Exactly.

The **Chairman**. Then what difference does the Fairness Doctrine make whether your ads get placed?

Mr. **Cathell**. It does place some accountability on the broadcasters to air controversial issues.

The **Chairman**. But they do not have to take your ads.

Mr. **Cathell**. He doesn't have to take our ads, but he does have to air controversial issues over the period of a year.

The **Chairman**. I understand that, but that is different. Your whole testimony related to these ads you tried to place.

Mr. **Cathell**. Right.

The **Chairman**. If you had no Fairness Doctrine how are you any better or worse off in getting these ads placed if the fear of the station is the reaction from their other advertisers or commercial accounts?

Mr. **Cathell**. In a way, that is the genius of the Fairness Doctrine. It does not say the radio station must take an ad from the National Association of Arab Americans. It does not say it must take an ad from the American Truckers Association. It does say that within the scope of a year, there has to be some—part of the responsibility of the broadcaster is to air controversial issues of public importance. It is left up to the broadcaster to determine which controversial issues they wish to air.

The CHAIRMAN. I understand all of that, but that has nothing to do with your advertising. Is that correct?

Mr. CATHELL. We feel as though it does have to do with our advertising, because we feel our advertising did present a controversial issue of public importance.

The CHAIRMAN. Are you saying some of the stations had to take them because of the Fairness Doctrine?

Mr. CATHELL. No, I am not saying that. I am saying our advertising fell within that area of the Fairness Doctrine that is controversial issues of public importance. It is still left up to the discretion of the broadcaster whether to air our particular controversial issue. He might choose in order to show that he can renew his license that he would rather air controversial issues on abortion, or no smoking, or capital punishment. It is our understanding they have the right to pick and choose which controversial issues they care to put on their air waves.

The CHAIRMAN. Mr. Irvine?

Mr. IRVINE. Mr. Chairman, I believe the distinction between the print and electronic media in terms of advertising is very marked. We have had a certain amount of experience in placing ads in the print medium, and we find that in general responsible newspapers will try to accommodate even the most controversial ads. Papers like the New York Times and the Washington Post will lean over backwards.

If there is something they want to exclude, as they have wanted to exclude our ads from time to time, they will try to do it on some ground that there is something inaccurate in the ad, not on the basis that they have the right to arbitrarily decide. Although they do have that right, they do not like to exercise the right to arbitrarily decide we do not like the ad and we do not like what you are saying and we are not going to run it. They are looking for a rational reason for not running it.

The CHAIRMAN. I will tell you one specific experience I had. The biggest department store in Portland was being struck and picketed, and the newspaper would not take ads by the union, because they did not want to irritate their advertiser. They had the right to do that, not take those ads.

Mr. IRVINE. They have the right. Broadcasters have the same right, but experience shows you have greater opportunities for alternative courses. Now, it is diminishing with the demise of newspapers. In the old days when the Washington Post would refuse an ad, we would go to the Washington Star and say, we want to run an ad criticizing the Washington Post, and you could get it run. Or you could go to the New York Times, which had a similar circulation and the audience we wanted to reach. Or you could put it in other media, on television and on radio.

I think you have an entirely different situation. You cannot reach the audience you want to reach. There is a very finite amount of time that is available. You cannot extend that. A newspaper can put in additional pages to accommodate the advertising. There is another important difference, and that is, you say, does the paper have to put on a contrary ad? Newspapers typically provide for a much broader range of opinion in discussing this controversial issues than does any broadcaster.

You have the letters to the editor column. You have the op. ed. pages. If I were to object to an ad from this gentleman's organization and wanted to disagree with it, I would have a very good chance of getting a free letter to the editor, an op. ed. article.

The **Chairman**. And you think there is something inherently different in the makeup of the managers of broadcast properties as opposed to newspaper properties? They just would not do that, assuming they had the same privileges and protections. They are a different genre, a different personality?

Mr. **Irvine**. It is not so much the character of the people involved. It is the character of the amount of space or time they have to deal with. That time to the broadcaster is very valuable. He has only 24 hours a day, and he has a much more limited amount in prime time. For a newspaper, all the Washington Post has to do is add a couple of pages on its press run. It can accommodate this more easily and less expensively than the broadcaster. He sees this as a terrible burden, to have to do these things, because he can sell it for thousands of dollars.

The **Chairman**. Assuming they were not deterred by the Fairness Doctrine and the response and content doctrines, most radio stations I know are perfectly happy to sell all of the advertising they can, and if that happens to be controversial advertising, my hunch is they would take it. There may be some stations that are very rich and are not worried about that, but that is not the majority of stations I have run across.

And my guess would be, in terms of public service commitments, if they were not worried about the equal time doctrines, they would sponsor more debates between rational candidates. They are precluded from doing this when they have to include the irrational candidates at the same time.

Mr. **Irvine**. Mr. Chairman, I feel rather differently today about radio than I do about television. I think we have less of a problem of scarcity in radio. We have greater diversity in radio. We have a lot of radio talk shows where all kinds of people, including even Accuracy in Media, are occasionally allowed on to express their criticism of the media.

Television is a different animal. We have a much greater limitation of stations and opportunities, and that situation simply does not apply in television. For example, even a powerful corporation like Mobil Oil has found great difficulty in getting its ads placed on television, especially on the networks.

The **Chairman**. Are you familiar with the answers Mr. Hemenway gave when he testified before this committee on the nomination of Steven Sharp to the FCC?

Mr. **Irvine**. Well, I did not review them before I came up here. I recall seeing them at the time.

The **Chairman**. Let me read you a couple.

> Senator Packwood: Theoretically, why should fairness apply any more to broadcast than print? Mr. Hemenway: Well, you could say the print media should have a great deal more fairness. I certainly would. We are at loggerheads with the print media constantly. Senator Packwood: In other words, do you think the fairness doctrine should apply to the print media? Mr. Hemenway: "Yes."

Mr. **Irvine**. I do not agree with Mr. Hemenway on that. Because of the nature of the print media, because of the greater diversity, because of the fact that I can start a newspaper and indeed a magazine and whatever, that the necessity is not so great.

The **Chairman**. Let me ask you and Mr. Simon this. Which do you think is harder to start or buy, a radio station or a newspaper?

Mr. **Irvine**. We have had an experience in Washington, Mr. Chairman, where nearly 2 years ago now a new newspaper was started, the Washington Times. I understand that in the first year or so it cost something like $50 million to get that paper underway. It still is not making money. It is having to be subsidized. I do not know very many people who are willing to make that kind of investment and that kind of sacrifice for the sake of providing an alternative voice in the city of Washington.

We have a situation out in St. Louis where the St. Louis Globe-Democrat is going under and has been saved at the last minute by someone who has moved in and will try to keep St. Louis a two-newspaper town. I think it is obvious, Mr. Chairman, that it is a very expensive proposition to start a major newspaper.

On the other hand, we have coming up in Washington papers like the Washington Inquirer, which I hope you see from time to time, which provides an alternative voice. We have a new newspaper being started, a new weekly newspaper being—I believe it is going to be called The Washington Weekly. These are being started on shoestrings, and they do provide an opportunity for alternative voices to be heard. You cannot do that in broadcasting. You cannot do that in television.

The **Chairman**. Why? You can in radio. We had testimony from the FCC on Monday, and I want to pose this to Mr. Simon, there were 1,800 license transactions last year. Seven hundred of those were simply minority interest purchases. Eleven hundred, however, were sales of majority interest. Only 10 percent were contested, and all of those were approved. The remaining 1,000 were approved almost automatically. One thousand different purchases of radio station and television properties. If you had the money you could buy one.

How many newspapers changed hands last year? How many people, if they really wanted to get into it, are prepared, to put up $50 million as Reverend Moon did last year? How many people have the time, the commitment, or the willingness to do it? How many, Mr. Irvine?

Mr. **Irvine**. I cannot give you a figure. Maybe Mr. Simon can.

Mr. **Simon**. Mr. Chairman—First of all, let us start with the issue of starting a radio or television station. I cannot do so at all in the top markets in the country. There is no available spectrum. So that option is not even available to me. I do want to start some low-power TV stations. I have applications in. They have been pending for 3 years. There are five or six other people on each frequency. I would say that is much more difficult.

In fact, there is no equivalent, obviously, in the print media, because indeed in the past 5 years we have started Access magazine, we have started a new journal, and of course if you are talking about what scale, what kind of paper, what size, the difficulty will obviously be different. If my only choice in buying the radio or broadcast station is to buy only the million or $10 million or $100 million station, it will be very difficult.

Part of the problem is, there is no market availability for lower priced, more focused stations. Why can I not buy a neighborhood broadcast station and broadcast in my neighborhood like I can put out a neighborhood newsletter?

The **Chairman**. When you say the word broadcasting in the broadest sense you should include CB radios, and everything else. You cannot equate your paper, to the Washington Post. We have these bootstrapping arguments. You say there are no more frequencies. The FCC testified the other day, and this is the third witness who has so testified that we could have somewhere between 95 and 100 new radio stations in this area if we want to reallocate one unused UHF franchise.

Professor Poole at MIT says 200. Dr. Buchsbaum says 125. The FCC says 100. When I asked each of them whether the market would sustain that many, they said that is not the question. There is no scarcity. We could have more stations in the area than the area could maintain. This is where the bootstrapping argument comes into play. We say there is scarcity because we will not allocate more and because there is scarcity we have these doctrines.

Mr. **Simon**. Mr. Chairman, I would not disagree with you in a sense. Let us put S. 1917 aside for the time being and look at the problem of getting more outlets. I have no problem at all adding those outlets to the market. I do not care if they are not economically supportable. Let us do that first. When we have those stations on line, when there are those vacant stations that we can say people do not really want, then we can legitimately come back and say there is no need for the Fairness Doctrine.

The **Chairman**. Mr. Gurss, let me raise two points. One, in your initial statement you made some reference to our repealing section 312(a)(6). We do not do that, and I wanted to make sure you did not think we are doing that.

Mr. **Gurss**. There is reference to 1304 and 1306.

The **Chairman**. At the start of your statement you talk about fraud in violation of the criminal code, and that is the section of the code to which 312(a)(6) applies. We do not repeal that. I realize it is an oversight. I do not mean to criticize you, but I do not want to leave the impression that the bill repeals that section.

Mr. **Gurss**. I would like to take another look at the bill, but my understanding is that 312(a)(6) would incorporate a recision of that provision. I would have to check that and get back to you, Mr. Chairman.

[The following information was subsequently received for the record:]

February 1, 1984.

Hon. Bob Packwood,
U.S. Senate
Washington, D.C.

Dear Senator Packwood: Thank you very much for the opportunity to testify before your committee concerning S. 1917. I wish to apologize for an error in my written testimony which averred that the bill would repeal the statutory provision concerning fraudulent activities by broadcasters. A member of our staff had incorrectly interpreted your bill as repealing Section 312(a)(6), when in fact it only repeals Section 312(a)(7). Unfortunately, I failed to spot this error prior to my oral presentation.

I respectfully request that this letter be placed in the record, so as to correct the mistake in my testimony.

Sincerely,

ROBERT M. GURSS, *Staff Attorney.*

The CHAIRMAN. Let me raise another point. You talk about the relatively slight number of filings before the FCC on fairness as an indication that it is not a great problem. Let me read you a statement and see if you agree with it. "Most of the dealings with the Fairness Doctrine are informal, the more informal the better." This is used to sustain the theory that it is not the number of filings that are key but the reaction of the broadcasters if you threaten to file.

Is that a fair statement?

Mr. GURSS. I do not think there is necessarily a threat to file that is involved. I can tell you from our experiences advising people who have Fairness Doctrine problems that most of these situations do not reach the FCC. They are worked out in the relationship between the broadcaster and the public, and that is one of the beauties of the system, because it keeps the Government out of it. It promotes the citizen-broadcaster dialogue.

Most of the time the citizens' group goes to the broadcaster and says, you have sold all of these spots to a particular side of a referenda issue. We do not think you are covering the other side of the issue, and most of the time the broadcaster says, you know, you are right, and they either put these people on a talk show or they put someone else on a talk show, or somehow or another cover the issue.

Occasionally the broadcaster is a little more resistant, and there is a negotiation process, and the citizens in the community work out with the broadcaster usually some sort of agreement on how many spots will be shown, or somehow they work it out. Rarely does it ever reach the FCC, and as my testimony stated, it is extremely rare for the FCC ever to do anything negative, and when they do something negative, all they do is say, you have to put on a little more programing. It is not a very serious sanction, actually.

The CHAIRMAN. Let me ask you another question, switching to equal time. How does the equal time doctrine benefit the public's exposure to political candidates?

Mr. GURSS. I believe it increases the exposure to candidates by requiring that if a broadcaster—let us turn away from the big networks, which are typically the focus of these discussions, and say a broadcaster in a small community, maybe the only TV station in the community, or the only AM-FM combination in this small community.

He or she who owns the station has a particular candidate and wants to promote the candidate, and puts the candidate on a talk show that fall under the section 315 provisions, and sells or even gives time to that candidate. Without section 315, there is no requirement that the public have an opportunity to receive, an equal opportunity to receive both sides, other legally qualified candidates in that election.

The CHAIRMAN. How do you handle the situation we recently had in the State of Washington regarding Senator Jackson's seat? Washington has a blanket primary initially. Everyone is on one ballot, although you file by party. They had 13 Republicans and 18 Democrats or vice versa for Senator Jackson's seat. The broadcasters basically put no one on. They would not hold debate because of equal time. There were only three or four candidates at most who rational observers said were rational candidates.

How do you handle an equal time situation given that field?

Mr. GURSS. The multiple candidate problem is frequently raised in this area, and one of the things you have to remember is that the statute as drafted by Congress says "legally qualified candidate," and that relates to what the local State——

The CHAIRMAN. These were all legally qualified. They were on the ballot.

Mr. GURSS. Then perhaps there was a problem with the State law. Those are legally qualified candidates. It is basically a civil liberties issue. If the State defines legally qualified in a certain way, should the broadcaster take the role of deciding which of these legally qualified candidates should be heard by the public?

The Chairman. In other words, should the broadcaster be able to exercise the same judgment as the newspaper editor? And your answer is no. The New York Times and other newspaper editors frequently have the leading candidates in to debate in front of the editorial writers, and they then present a transcript and comments. They do not invite all 33 candidates.

Mr. GURSS. Broadcasters do not have to invite all 33 candidates either, under the rule, which—First of all, the Commission has just changed the rule, and we opposed that.

The CHAIRMAN. I know that. What do you mean, they do not have to invite all of the candidates?

Mr. GURSS. Under the rule the Commission recently changed.

The CHAIRMAN. No, but you are opposed to the change.

Mr. GURSS. All right. The change permits them not to have to run any—to give the candidates any other opportunities. Under the pre-existing rule, the broadcaster could have only two candidates in for a debate, and could run it, could set up the debate however he wanted. He could stage the debate, have it in the studio, whatever he wanted, and he didn't have to invite all of the candidates, but if there were excluded legally qualified candidates, he had to give them equal opportunities at another time. He did not have to put them in the debate, so you would not have an unwieldy debate with 13 candidates.

The CHAIRMAN. I think you misstate the law.

Mr. GURSS. I do not believe so.

The CHAIRMAN. He could bring them on two at a time, all right. He could put on Jones and Smith tonight at 6:30 and Green and Brown tomorrow at 6:30, and two more the next day at 6:30, and two more the next day at 6:30, but he would have to give them all identical opportunities.

Mr. GURSS. It would have to be equal opportunity, and it would be a subjective test as to whether it would have to be exactly the same time.

The CHAIRMAN. It would not have to be 6:30. Maybe it could be 7:30. But if the broadcaster tried to put them on at 1 o'clock, the candidates would object.

Mr. GURSS. That is correct.

The CHAIRMAN. So in essence the broadcaster has to provide equivalent opportunities for all. And in the Washington State situation there were 31 candidates, of whom only four were considered to be serious candidates. As a result of the rules, they put on now. How is the public benefited by that?

Mr. GURSS. The public is benefitted, I believe, first of all because these are legally qualified candidates, and the broadcasters——

The CHAIRMAN. Thirty-one legally qualified candidates get to hear from none.

Mr. GURSS. I think broadcasters are erring in making that choice. I also say, first of all, while we opposed it, the Commission has changed this rule, and in terms of the multiple candidate situation, if that is the problem, then modify the rule. For example, the same problem comes up with political editorials. The Commission can modify the rule if they want to and make it easier to deal with multiple candidate races.

Do not throw out the whole rule because of an occasional problem.

The CHAIRMAN. But you would oppose that, would you not?

Mr. GURSS. I would oppose it, but I am saying, do not throw out all of section 315 because 10 percent of the time there is a problem with 32 candidates, because most of the time there is not.

The CHAIRMAN. As a matter of fact, it goes the other way, particularly in primaries. Most of the time, especially for local races such as sheriff, auditor, county commissioner, you have a plethora of candidates in primaries. This may not occur as often in genral elections because you have narrowed it down some, but you still are faced with the problem of third party candidates and write-in candidates.

But in most States where there are primaries you normally have a plethora of filings for nominations on both sides.

Mr. GURSS. I find it very troublesome if a local broadcaster in a local race which may get little coverage anywhere else—I mean, there may not be, especially if it is near a larger city and there is no local newspaper to cover the issue extensively.

The other legally qualified candidates who have met the State requirements for getting on the ballot may not have any other opportunity to get on the air except on the broadcast outlet in that area, and for the broadcaster who is a public licensee to make a decision of who is going to get exposure to the public, I think that is wrong.

The CHAIRMAN. Mr. Irvine, let me ask you a question. In your first page, you said, "No doubt you and some proponents of this are motivated by noble intentions, but it is clear that those who have led the effort to remove all fairness restraints from broadcasting are thinking of their own selfish interests and not the welfare of the nation."

By and large, I have had to drag the broadcasters into this kicking and screaming. They have come along, but the real support for it comes from the American Newspaper Publishers Association, the American Society of Newspaper Editors, the Association for Education in Journalism and Mass Communications, Sigma Delta Chi. Those people cut across all media. The Society of Newspaper Editors especially is often at odds with the newspaper publishers. The editors are not the owners.

Where is their selfish interest? What are they thinking of?

Mr. IRVINE. Mr. Chairman, I do not know how long, how many years back your personal involvement in this goes. I do not recall it going back as far as 1973. Maybe it does. But my experience with it started when the Accuracy in Media won a fairness doctrine ruling before the FCC in 1973. It involved NBC over a program called "Pensions: The Broken Promise." This came as a great shock to NBC and some people in broadcasting, to find that for the first time the FCC had cracked down on them on the basis of a discussion of a controversial issue of public importance of this nature, and the beginning of the campaign as I perceived it to get rid of the fairness doctrine stemmed from that case.

We saw CBS and NBC condemn the fairness doctrine, but ABC did not. That is why I mentioned CBS and NBC particularly. It is they, it is the people in the industry who have brought the newspaper people into this. They were campaigning, and if you were in broadcasting over those years, you saw how the leaders of the networks, the broadcast industry were leaning on their colleagues in the newspaper field, come and support us, give us your help. We are just like you. We have the same first amendment rights you do, they said.

The CHAIRMAN. Basically what you are saying is that the newspapers are also defending their own interests.

Mr. IRVINE. Let me put it this way. Newspapers today are also holders of broadcast licenses.

The CHAIRMAN. So they are, therefore, working toward a selfish end.

Mr. IRVINE. Yes.

The CHAIRMAN. What about the teachers of journalism?

Mr. IRVINE. They are misguided.

The CHAIRMAN. Ah.

Mr. IRVINE. Professor Fisher is an exception. I do not know. We have not taken a poll. But I suspect there are a lot of Roy Fishers out there.

The CHAIRMAN. I would bet if you took a poll of the NAB you would have some people who dissent from this because they like the Fairness Doctrine. It protects them from having to do controversial things. They can hide behind the doctrine and say I do not want to put that on. I will have to give someone else time. I do not want to give the impression that any association is 100 percent in favor of this bill. I have never polled the NAB, but I would assume this it true of them as well.

Mr. IRVINE. A lot of the broadcasters I have talked to, and I travel around the country and give a lot of speeches and appear on a lot of radio and television programs—I have found very few instances, Mr. Chairman, where the broadcasters in the country feel they are inhibited by the fairness doctrine. What really makes me feel good about it is, when I get out into these markets, I find that the broadcasters by and large are interested in fairness. They are willing to go along. But this is because they have grown up in this tradition. They recognize they have an obligation.

The **Chairman**. Newspapers have grown up in this tradition without the obligation.

Mr. **Irvine**. Newspapers have not—we have 1,700 newspapers. I cannot characterize all of them. I have had a lot of experience with the Washington Post, for example. In 3 months in the last part of last year, Mr. Chairman, I sent something like 15 letters to the Washington Post objecting to various inaccuracies appearing in that paper, and not one was published. I do not know about fairness at the Washington Post, whether they have grown up in this tradition or not. I think that if I had a similar grievance with a radio station or broadcasting station, I might have had better results trying to invoke the fairness doctrine, as this gentleman has said.

You go to a lot of these stations, and you find they are willing to say, yes, that is right, we did neglect that side, we did not put this issue on. The newspapers vary a lot. They do not have the same—they say, get lost. They can say that. That does not mean they always do it. They have their letters column. They are willing to put in opposing points of view. But it is strictly up to them. It is strictly up to them whether they do it or not.

The **Chairman**. Mr. Simon, let me conclude by saying that it was fun joining you in the telephone fight. That fight is not over yet. We will see how the FCC comes out with their access charges.

I have been in this business long enough to know there are no permanent enemies or permanent allies, just temporary arrangements. You and I will be together again on some issues, I can assure you, in the future. And you are, I will say to this audience, a hell of an ally to have, a tough fighter.

I would rather have him with me than against me on this, and although we disagree on this issue, we will be back together on another one.

Mr. **Simon**. Thank you very much.

The **Chairman**. Gentlemen, thank you. It was a most helpful panel.

Now let's go to Mr. Ford Rowan.

STATEMENT OF FORD ROWAN

Mr. **Rowan**. Thank you, sir.

The **Chairman**. How are you?

We appreciate your coming.

You might want to comment on the NBC pension case.

Mr. **Rowan**. It was an interesting case, and if you wish to go into it, I would be glad to, although at the time it was litigated I was not involved in it.

I appreciate the opportunity to testify, and I hope it will prove useful to hear someone who has been in the news business for almost 20 years who has also looked at this problem as an attorney.

I want to stress, though, that I appear as a private citizen representing no organization. In deciding where I stand on this issue, I have tried to not let where I sit determine my position. I sit mostly in the press gallery. I am the host of the Public Television show, "International Edition." I have practiced communications law in Washington. It should be noted I never lobby Congress on behalf of clients. And I have taught part time in Northwestern University's School of Journalism.

In sum, I have tried to draw on my rather varied experiences in writing a book which will be out in a couple of months called "Broadcast Fairness: Doctrine, Practice and Prospects," which Longman's is publishing. The research was funded by a grant from the Media Institute. They gave me complete freedom and never suggested what conclusions should be reached.

However, at the outset of the study I had no strong feelings against the regulations. As you might expect from a journalist, my left knee started jerking every time I heard the first amendment mentioned, but I had worked for almost two decades as a reporter without ever once fearing that big brother was going to look over my shoulder and second guess what I had written. And I had written some controversial stories, including one that got me denounced during a floor debate in the House of Representatives. But I did not worry about the fairness doctrine because, No. 1, I liked getting all points of view. I like controversy. Most journalists want to put on all points of view in their stories. The second reason I did not worry about it is I was not a licensee and I had nothing at risk. And the third reason I did not worry about it was I was not a manager or editor, a news director or a bureau chief, and consequently, I was not hassled by people with complaints.

In short, when I started my study, I tried to keep an open mind. I did not want to write a book just supporting arguments for preconceived conclusions. I thought the best starting point was to find out what really happens when a fairness or equal times dispute arises.

With the excellent help of Timothy G. Brown, we were able to evaluate how the regulations work. The chapter in the book on the informal workings of the fairness doctrine seeks to answer the question of why broadcasters feel chilled by the rules when the rules are rarely enforced against them.

What we found supports the view of Andrew Jay Schwartzman, the executive director of MAP, the media access project, that the success of the fairness doctrine should not be measured by what happens at the FCC or by the number of complaints or suits filed. He said, "Most of the dealings with the fairness doctrine are informal, the more informal, the better." So we tried to probe how these informal arrangements work in the real world and not necessarily in the corridors of the FCC.

We found that organized interest groups, many represented by MAP, were very successful in pressuring broadcasters to provide free access to the airwaves to respond to paid commercials which took stands on public issues. But we also found that many broadcasters who did not want to give away their inventory, which is air time, declined to sell commercial time for advertising that did raise controversial issues.

Some may contend that it is good that groups which cannot afford to pay for commercial time could get some access to propound their views, but what of the reluctance of some broadcasters to air issue advertisements for fear of opening a can of worms, as one executive put it?

The fairness doctrine is a crude but very complicated tool that only results in organized groups winning access to the air after a station has aired one side of a controversial issue of public importance. We found clear indication that broadcasters sometimes duck those issues, depriving MAP's clients of access, and more importantly, depriving the public of a good discussion of an issue.

I think it is good when society gets to hear a vigorous debate about public issues with divergent viewpoints. So I looked with sympathy on proposals to substitute a public access rule for the current fairness regulations. In the book, at length, I discuss seven different ways for access to the airwaves, ways that could be structured. Let me oversimplify by saying it comes down to two choices. One is voluntary access and the other is a mandatory public access scheme.

Urging broadcasters to voluntarily open up the airwaves for more debate and discussion is a very good idea but hardly likely to please the critics on both the right and the left who distrust broadcasters and feel that they have been unfair or people who have had the door slammed in their faces in the past. Mandatory access schemes, on the other hand, hold out the unfortunate prospect of landing everyone right back in the regulatory quicksand of inconsistent decisions, complex procedures, and governmental monitoring of broadcaster performance.

In sum, I concluded that the less the Government intervenes, the more incentive broadcasters would have to provide issue programing to their audiences.

The CHAIRMAN. Let me ask you a question right here. You heard Mr. Cathell representing the Association of Arab Americans. I tried to pose that question—would more broadcasters be willing to accept his ad if they were not afraid of the fairness doctrine, which might require them to take an opposing ad? His answer seemed to be no, although he admitted he heard some complaints about not taking it because of the fairness doctrine.

Clearly some stations will not take ads, just as some newspapers will not take ads. This is not always as a result of the fairness doctrine. But would you conclude on average that he would have a greater chance rather than a lesser chance of placing his ads if the stations were not worried about a fairness doctrine?

Mr. ROWAN. Absolutely. I agree with Mr. Irvine, newspapers provide more contrasting views in their advertisements. I disagree with what he thinks the reason is. I think the reason newspapers are willing to accept controversial ads is because they are free of regulation.

So I agree with you on this point. I disagree with Dean Fisher. I think controversy draws an audience. I think it is exciting, not boring. I think that freedom of expression leads to more expression and more diversity, but that is a thesis that I know some people have disputed here, and one that is very difficult to prove, especially in the current regulatory environment.

One of the things I looked at in the book is possibly suspending all of these rules for a while to see what happens and then guaranteeing the opponents of deregulation an up or down vote sometime in the future. I also suggest some other policy choices that fall short of the kind of approach you take. But I want to stress that my preference is to scrap the rules entirely and afford full first amendment protections to broadcasting, cable, and the new electronic means of communicating. It is a question of whether society is willing to assume the risk that the media might misbehave.

It all comes down to a question of which course poses the greater risk. Does regulation tend to chill vigorous debate and pose the danger of political abuse and manipulation? Or would a broadcast industry free of content regulations be likely to suppress viewpoints and stifle public debate?

Here are the 18 points we concluded after the study in this book.

No. 1, technological change and the emerging methods of communicating have undercut the scarcity rationale for regulating the content of broadcasting.

No. 2, the system of broadcast regulation evolved because of Congess fear of the political impact of broadcasting.

No. 3, politicians seek to maximize their own access to the airwaves and neutralize broadcasters' power.

The CHAIRMAN. I will let you go on a little longer because I have been interrupting you.

That has been my exact experience. If anything, equal time is designed to help incumbents. When an incumbent is more newsworthy than the challenger, we fit in the news exception. A broadcaster cannot have a debate between the candidates unless they have offered all candidates the time. We choose not to engage in a debate. We can finesse it somehow and say we cannot be there on Wednesday and we can keep our opponents off the airwaves without having actually turned down the offer to debate.

Also, an incumbent always has ways to can get on the air. They will put an incumbent on for a half hour talk show. This may indeed qualify as news. They will put an incumbant on those morning shows that come on right after "Today" or the "Good Morning America" shows. Those are not news shows. Yet let your opponents try to get the same time or space, even under equal time, and they usually cannot do it.

Mr. ROWAN. That is right. As an incumbent, you can raise money and buy time. You have the right to buy time.

The CHAIRMAN. Even the incumbent with the least experience benefits from that. Our challengers have a great deal of difficulty raising as much money as an incumbent. If we have most of the money and can buy the ads at the lowest unit rate, it simply increases the advantage an incumbent has.

Mr. ROWAN. Let me go through this list to get it on the record.

No. 4, under the current system, broadcasters seek to maximize profits and placate the powers that be.

No. 5, the fairness doctrine, as applied by the FCC, protects broadcasters and affords complainants very little chance of success.

No. 6, the fairness doctrine has forced broadcasters to capitulate to demands by interest groups for access to the airwaves.

No. 7, complex regulations have been applied inconsistently, leaving the public and broadcasters unsure of which issues must be aired, which issues must be treated fairly, and what fairness really is.

The fairness doctrine, No 8, is largely irrelevant to daily news coverage.

No 9, the fairness doctrine has always been impotent in curing the real causes of bias in the news.

No. 10, the personal attack rule has burdened the stations with excessive procedures while not affording persons who were criticized on the air an adequate reply remedy.

No. 11, the political editorializing rule has drastically chilled the expression of opinion by broadcasters.

No. 12, the regulations on issue advertising have limited expression of views on radio and television.

No. 13, the fairness doctrine has had the unintended impact of thwarting increased public access to the airwaves.

No. 14, access provisions, while meriting closer study, may share many of the problems of implementation and adjudication posed under the current system of regulation.

No. 15, the effect of the fairness doctrine equal opportunities rules and reasonable access provision has been the broadcast of conformist, centrist, mainstream opinions.

No. 16, the rules operate to protect the dominant two political parties from third party and independent challenges.

No. 17, competition among ideas and broadcasters should be a major goal of public policy. Yet, proposals to let market forces prevail in broadcasting must be examined to assure the market is not dominated by monopolistic giants.

No. 18, when possible, regulations stressing structural guarantees of diversity in communications are preferable to regulations affecting the content of material which is broadcast.

I would like to put the rest of this in the record and sum up with one sentence that says fairness, equal time, and reasonable access rules have proven to be unfair, inequitable, and at times unreasonable, and ought to be abolished.

[The balance of the statement follows:]

The picture is not all bad. That's because the regulations usually have not been applied in a heavy-handed way. Broadcasters have wide discretion under the rules and they've often resisted the temptation to play it safe with bland, conformist fare, or strike out on biased, partisan crusades.

But the potential for political abuse of the rules remains and I cite several instances when advocates of the left and the right have used the regulatory system to try to suppress contrary viewpoints.

I would like to close on a political note—afterall, this is an election year. The equal time rule is less offensive to journalists than the Fairness Doctrine because most programming is exempt from equal time requirements. But the interaction of these various regulations has produced what I termed "regulatory schizophrenia."

I don't want to become too technical, but consider two cases that arose under the Fairness Doctrine, *Zapple* [1] and *Cullman* [2].

Zapple requires that when a station gives or sells time to a supporter of a candidate during a campaign, it must afford a quasi equal opportunity to supporters of the candidate's opponents. This means that if free time is given to one candidate's boosters, it must be given to the other candidates' supporters. If paid time is sold to one supporter, it must be available for sale to the other's supporters.

Cullman requires a broadcaster who has chosen to air a sponsored program or commercial that raises a controversial issue of public importance to air opposing views, even if it cannot find sponsorship for the contrasting viewpoint. Thus if one side of an issue is presented in a paid ad, the station may have to give away time for the reply. *Cullman* has a major impact on advertising about ballot propositions; if one side buys time to oppose a referendum question, supporters may seek free time to reply.

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[1] *Nicholas Zapple*, 23 FCC 2d 707 (1970).

[2] *Cullman Broadcasting Co.*, 40 FCC 576 (1963).

Both *Cullman* and *Zapple* are Fairness Doctrine cases but they reflect very different perspectives. *Cullman* requires free response time for paid issue ads. *Zapple* requires equal treatment; a paid ad only need be rebutted if the other side can afford to pay for its message.

Zapple was designed to avoid unequal treatment of candidates and reflects the goals of the equal time rule. It does not seem fair to require one candidate to buy time then permit his opponent to plead poverty and receive free time under *Cullman*. But *Zapple* applies only during campaign seasons. The rest of the time *Cullman* applies. Usually.

In my book I examine several cases during the last dozen years in which the FCC—and the courts—have had to grapple with complaints by political parties and independent political groups both during and before campaign periods. This is not the time to go into a great deal of detail; some of the cases involved paid advertisements; others related to requests for resonse time after presidential addresses. At times the FCC recognized that "electioneering is a continual process;" at other times it limited the *Zapple* concept to campaign periods.

I don't want to recount a bunch of cases here, but perhaps it would be helpful if I focused briefly on a recent one, in 1982 during the last campaign. You may remember that right before the congressional election President Reagan asked for free time from the networks to address the nation on the economy. The Democratic National Committee denounced Reagan's speech as "partisan campaigning." The DNC urged the networks not to carry the address.

ABC decided the speech was not newsworthy enough for live coverage but used excerpts on newscasts. CBS and NBC decided to carry the Reagan speech live. The DNC demanded equal time from CBS and NBC to reply. The party compromised with NBC so that the DNC could have a shorter time period immediately after Reagan spoke (just before start of a World Series game). CBS, however, declined to give the DNC time right after Reagan or a similar time slot the following night. Instead CBS broadcast its own news special at 11:30 pm, featuring interviews with various Democrats. CBS did not carry the complete reply by the Democratic Party spokesman, Sen. Donald Riegle.

Riegle was the choice of the DNC to make the reply that aired on NBS. CBS chose instead to produce its own news program, partly out of concern that Riegle's appearance would trigger equal time requests from the Republicans in Michigan, where Riegle was running for reelection.

The DNC filed a complaint against CBS demanding prime time for the spokesperson of the party's choice. But the DNC faced a major hurdle. The equal time rule only applies to candidates and Reagan was not candidate himself in 1982. Moreover, the equal time rules do not apply to bona fide coverage of news events, like a presidential speech. Of course, the Fairness Doctrine does apply to news coverage, but it does not require equal coverage, only that broadcasters provide contrasting views in their overall programming. The Fairness Doctrine gives broadcasters much more discretion than the equal time rule.

CBS had given broad coverage to the state of the economy, had shown news items about Reagan's policy and the opposition to it, and had featured Democrats criticizing the Reagan speech. How then could the DNC hope to prevail in the 1982 complaint?

Zapple. That case had attached some of the equal time concepts to the Fairness Doctrine. If Reagan were considered a spokesperson for all those Republican candidates running for reelection, then, the DNC argued, they were entitled to a quasi equal opportunity to respond and with equivalent time and the spokesman of their choice. The FCC turned the Democrats down.[1] It held that *Zapple* was not designed to apply to news coverage of events the broadcaster reasonably felt were newsworthy. Although *Zapple* is part of the Fairness Doctrine, the idea of quasi equal opportunities meant that exemptions under the equal time rule should apply to *Zapple* situations as well.

All this raises several points, not the least of which is whether the regulations are too complex. During the 1982 campaign the FCC had staffers manning phones 24 hours a day, fielding about 3,000 calls a month. The inquiries from candidates, campaign managers, and stations about fairness, equal time, *Cullman* and *Zapple* obligations were extensive. Naturally, politicians tried to maximize their exposure on the airwaves by using the complicated rules.

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[1] *Democratic National Cmte.,* FCC 82-477 (1982).

One thing that is significant about the FCC's decision in the 1982 DNC case is that the Commission had to second-guess the news judgment of CBS. Rather than looking to what the DNC said was important (Reagan's political use of the media), the FCC tried to peer into the mind of the broadcaster:

> It is not the partisan political purpose of the speaker [Reagan] that is controlling; rather it is the intent of the broadcaster in making a judgment whether to carry specific news programming. In short, it is recognized that political discussion is inherently partisan. To place the broadcaster and ultimately the Commission in the role of assessing the content of speech contained in news programming to determine whether it was partisan would be an inappropriate and impracticable intrusion. . . . If the broadcaster intends to further a candidacy rather than affording coverage solely because of its newsworthiness, then and only then did Congress indicate an intention to remove the bona fides of particular news programming.[2]

To its credit, the FCC refused to assess "the content of speech contained in news programming," but it continued the practice—equally intrusive—of trying to judge the "intent of the broadcaster" in deciding whether to air a specific speech.

No one can blame politicans for trying to use the rules to gain exposure on television and radio. But to mask the use—and occasional abuse—of the regulatory framework with concepts of fairness, equality, and "reasonable" access is to disguise what the rules really are: a tool of the powerful.

Consider the plight of the independent political committees. If they pay for time to attack an incumbent for his or her stand on the issues prior to the start of a campaign, the broadcaster may have to give away time to the incumbent under *Cullman*. But if the attack comes during the campaign *Zapple* applies and no free time need be given.

In 1981, NCPAC, the National Conservative Political Action Committee filed a complaint with the FCC against stations that refused to run NCPAC ads. NCPAC said it should have a "reasonable right of access." The FCC turned it down and warned that acceptance of NCPAC ads outside campaign periods by stations could trigger *Cullman* obligations.[3] The FCC reached this decision even though earlier cases had refused to extend *Cullman* into the "political arena."[4] Moreover, independent groups are treated differently than established political parties; when a party buys advertising time outside campaign periods, *Cullman* does not apply.[5]

And consider the inconsistent treatment of issue-oriented advertisements which do not express a preference for any candidate. They are subject to *Cullman*, even if they relate to a ballot referendum issue. Thus if a corporation buys time to express a view about a proposition, the station may face a demand for free time from a group that asserts it cannot pay for airtime.

Is it fair to treat candidates, supporters of candidates, political parties, independent groups, and issue advocates in such an inconsistent and confusing way?

If the above description leaves one muddled, this is because regulatory policy is muddled. The distinctions between candidate and issue, between campaign and noncampaign period, between established party and independnt PAC are illogical. Candidates run on issues, even if not always comfortably. Issues are in the "political arena," even if not always in a partisan way. Ballot propositions stir political fervor just as candidate races do. Why treat them differently? If "electioneering is a continual process" why distinguish between campaign and noncampaign periods at all? Why grant access rights to candidates but deny them to independent groups opposing the candidates?

There's no good answer to these questions. the mesmerizing effect of words such as fairness and equal time is only dispelled if one focuses on who gets what, when and how.

The rules have been rigged to favor the powerful. Incumbent politicans retain their newsworthy advantage and stations need not cover fringe candidates on the news. Candidates have access rights to purchase airtime. Debates can be staged to exclude candidates who are not in the mainstream. The conventions of the Democrats and Republicans can be covered gavel-to-gavel without a minute of coverage of the meetings of the Socialist Workers, the Libertarians, or the Citizens Parties.

Taken together, Congress has fashioned the equal time, fairness, reasonable access and lowest unit charge provisions to protect the members of Congress themselves.

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[2] *Id.*, at pp. 5–6, 9.

[3] *National Conservative Political Action Committee*, FCC 82-167 (April 6, 1982).

[4] *Hon. Thomas F. Eagleton*, 81 FCC 2d 423 (1980).

[5] National Conservative Political Action Committee, 89 FCC 2d 626 (1982).

Broadcasters have not found it hard to survive and flourish under such constraints. Afterall, established broadcasters reap great profits while establishment politicians preserve political power.

But is the public well served by such a system? I think not.

The CHAIRMAN. You are right to summarize it because if you were to read it, it would be confusing even with or you know the Zapple and Cullman doctrines.

But I love the examples you chose. One of the witnesses in the previous panel said what is needed is to codify and simplify the fairness rules and give them to the broadcasters so they will understand them. You attempt to do this with Cullman and Zapple, with such issues as defining what a campaign is and how long does the campaign last. You can not simplify these. You come down to a case-by-case situation where finally the broadcaster says the heck with it, it is not worth it to take the ads. The ad will probably cause more headache than it is worth. I can see it coming to that.

Mr. ROWAN.The regulatory policy is muddled. It treats candidates differently from independent political groups. It treats ballot propositions differently than political contests. It treats interest groups differently depending upon their relative wealth.

But the point I would like to make is there is something that is sort of bottom line here. That is, the system as a whole, when you take equal time, reasonable access, and the fairness doctrine and put it all together as a whole, what it does is support the powerful, the status quo. It hurts the groups that we heard testify just before on the right and the left. I am amazed to see them support something that really gives them only scraps from the table. The impact of broadcast regulation as it exists in this country today is to support the status quo.

The CHAIRMAN. If broadcasters knew their renewal in no way depended upon fairness or equal time, I would wager that I and my fellow Senators and most of the rest of the politicans would get attacked more often by the broadcast media than we ever will under the present circumstances. They will not touch us so long as we sit here controlling the rules under which their licenses are ultimately approved.

And I agree with you. Every incumbent, I suppose, from a purely selfish standpoint, ought to vote to strengthen and increase these rules and make them more onerous and difficult because they clearly benefit us.

Mr. ROWAN. And I think that is one of the reasons it will be very difficult to pass this legislation.

The CHAIRMAN. Especially difficult when much of the opposition phrases it in terms of giving an opportunity to the little person, giving them the same chance that the big boys have. You and I know from experience however, that is not the way it works.

I have also discovered something that is very interesting. The broadcasters and cable are both supportive. In addition, when you bring in ANPA newspaper editors, Sigma Delta Chi, and the journalism deans and teachers, you have a broad coalition of support. The opposition comes from the very conservative and very liberal groups. For a long time I tried to figure out why, because these groups normally do not agree with each other on most issues. What I have concluded is this. It may not be conscious, but they are both upset with the media for one reason or another. They both believe in their social views so honestly and tenaciously that they think it is the obligation of the media to help promulgate those views. Whenever they are in control of Government they try to make sure their views are the views that are promulgated. As a result they will take their chances and hope they will be in control of Government.

I do not say this with reference to any of the panelists who were here before, but I think deep down there are many people on the left who would really like to own the media, or have the Government own it. There are also many on the right who, if they do not want to own it, certainly want to censor it to make sure that it does not do anything that might be anathema to their particular philosophies.

Both of those groups can join hands. They have different social purposes, but they want to use the media to achieve those purposes. This is unfortunate. I understand how they feel, but I think they would accomplish what they want more easily if we did not have these doctrines. I think some stations would air some of these issues if they did not have to worry about the fairness rules.

Mr. ROWAN.That is my point. You have much more hope for diversity of viewpoints being expressed on the air in the absence of regulation.

As I say, it is hard to test that thesis, but I would look to newspapers, and here we have a case in many cities where there is only one newspaper, but they do not shy away from controversy. They accept issue advertising. Their front page is full of diverse viewpoints, maybe not as much as I would like. I would like to see Sam Simon's group get more access to the airwaves. I would like to see them get on. I do not think a mandatory access scheme would work very well. We would get right back into the same kind of problems we have now. But one would hope broadcasters would see it in their own economic self-interest because of marketplace forces to give more time to divergent viewpoints.

There is no guarantee that that will happen, but I can tell you under the current system it is not happening very well.

The CHAIRMAN. I agree.

Mr. Rowan, as I said to Mr. Abrams earlier, who has a great background in the law on this, I appreciate your great background in journalism on this. You said when you went into the study, you went in with a blank slate. You have no preconceived notion as to where you would come out.

Mr. ROWAN. That is true, except I want to say, like everyone else, I carried my own subjective biases into it. I just tried to be detached and think about it, and if you look at some of the chapters on access in the book about trying to grope with the problem, how do you have an equitable system that provides for divergent viewpoints being expressed publicly, I think you will see that there are good arguments on both sides, but the bottom line is I am afraid it is very hard to devise a system of regulation that will not get you right back into the same problem you have here.

The CHAIRMAN. Mr. Rowan, thank you very much for coming.

Mr. ROWAN. Thank you, sir.

The **Chairman.** We are going to move to a panel consisting of Mr. Hobler, Mr. Saadi, Mr. Mell, and Mr. Cohen.

We will take a quick 5-minute break and then move to that panel.

[Brief recess.]

The **Chairman.** Let us start with the panel. Panel members are limited to 5 minutes in appearance. I might say to Ms. Donnelly, who was scheduled on a previous panel but whose plane was late, I will put you on after this panel. I will put you on alone if you will please keep your statement to 5 minutes.

Mr. Hobler, why don't you go first.

STATEMENTS OF HERBERT HOBLER, CHAIRMAN, NASSAU BROADCASTING CO., PRINCETON, N.J.; RAYMOND SAADI, VICE PRESIDENT AND GENERAL MANAGER, KHOM, HOUMA, LA; DEAN MELL, NEWS DIRECTOR, KHQ, INC., SPOKANE, WASH., AND STAN COHEN, GENERAL MANAGER, WINZ-AM, MIAMI, FLA.

Mr. **Hobler.** Thank you.

I have been in broadcasting 37 years, 18 in television. For the last 20 years I have owned my own radio stations in Princeton and Trenton, N.J. As a result of my involvement in first amendment matters, I came to the attention of my fellow broadcasters and served two terms on the NAB board where I was chairman of the First Amendment Committee. I will differ from my notes which I filed.

The public has a right to viewpoints, advocacy, and controversy, as someone suggested earlier, and they are not getting it, and I once wrote a paper called the "fairless doctrine," which I think is somewhat descriptive of what we have.

I got interested and mad as a broadcaster with the impositions foisted upon me and every other broadcaster with a monthly obligations announcement. Over the years, we have all had to run it, so I did an editorial surrounding it, criticizing it, and under the fairness doctrine offered response time to Chief Justice Burger, the chairman of the FCC Commission, and our two U.S. Senators, all of whom responded saying they declined to respond.

But I attacked the fairness doctrine through this for 84 consecutive months, and my listeners in the area began to understand what freedom of speech was all about. When we were prohibited to even mention the word "lottery" about 9 years ago, and the lottery was pulled out of New Jersey at 12 noon, at 12:05 every day we said something occurred in the statehouse or the State capitol 5 minutes ago, and someone won something which you can go to the free press this afternoon to find out about. So, we have tried to dramatize these things as they have occurred in an innovative way.

The thing that brought the greatest attention to me, perhaps, on the first amendment was when I decided 8 years ago to give free time to the 12 legally qualified gubernatorial candidates running in New Jersey in 1973, so I offered to and gave for 7 consecutive weeks to the Republicans, the Democrats, the Down with Crooks Party, the Communists, the Socialists, all of them, 1 minute of time at 7:15 a.m. each week. I followed every single rule, and spent about $10,000 for a Washington attorney to make sure I was properly doing it. I could not find one of them for several weeks. He was the gypsy candidate.

Then several of us decided to endorse candidates. We endorsed 45 candidates, 23 Republicans and 22 Democrats. We did it in a very brief manner, because we had to. It took 14½ elapsed minutes on our two stations, and in return we had to offer 396 minutes, because, first of all, of the equal time law, and then as the fairness doctrine did apply including the candidates we endorsed, who would have time in response to the people who criticized them.

We had 108 minutes of rebuttals on Friday before election day on our two stations, and I suggest that this idiodic stunt that we did certainly demonstrated we could not serve the public the way we wanted to, and of course 98.3 percent of all the people in New Jersey voted for Democrats or Republicans. When I got on the NAB board, I created a newspaper which many of you in this room have seen. Maybe you haven't seen it, because this suggested a Federal newspaper commission imposing on all newspapers the same rules and regulations we have.

And when I look at it today, I notice that when I created this 8 or 9 years ago, I put the date "April Fool's Day, 1984, George Orwell Day."

From another document I wrote that I called the "Declaration of Broadcast Freedoms," I asked, "By what yardstick does Government proclaim that 9,000 broadcasters will be any less responsible with their freedoms than the 9,000 newspapers whose influence becomes less as broadcasting becomes greater? By what yardstick can the Government judge the propriety of one viewpoint compared to another, one issue compared to another, or why or how controversy should or should not be treated."

I was in the office of a former FCC Commissioner 7 years ago, and I do not know when I have been so humiliated. When I said, why should we be treated differently, he said, "I do not trust broadcasters." That really disturbed me.

Then you talk about the fairness doctrine, and the fact that some broadcasters do favor it. Indeed, some of them do, including Westinghouse. At one of the broadcasting editorial convention, I asked the editorial writer for the Westinghouse station in Boston if he felt inhibited. He said, "No, I don't feel inhibited at all." I said, "What if you had to do a really gutsy situation, a really controversial one? Would you go ahead and do it?" And he said, "Oh, no, I would call the main office in New York first and they would get in touch with our FCC attorney, and we would consider whether we would carry it." I said, And you do not think you are inhibited? Certainly a local newspaper would not do that."

Senator Bradley was well known to me, since I am from Princeton and we used to broadcast the Princeton basketball games, and when he decided to run for political office, so did Jeffrey Bell. Neither of them had ever been elected to political office, and I felt it was important that their viewpoints be known, so I decided to offer them a half an hour of time each week to debate each other for 6 weeks. However, I checked with my attorney and found that the legally qualified other candidates included the Down with Lawyers, the Socialist Worker, the Socialist Labor, Independent, In God We

Trust, Politicians are Crooks, Labor Party, and Libertarians, so I could not make the offer.

I think that you, Senator, and Senator Goldwater, and Senator Lautenberg, and Reed Irvine, and Andy Schwartzman, and Gene Fisher should all have access to the airwaves, and the way it will happen is to free them, because I guarantee you there will be far left and far right and moderate viewpoints, and maybe half of them scared to do anything. The viewpoints will be there, and you can dial around. Antonio Scala, a University of Virginia law professor, said one time if an English Governor said to Tom Paine,

> Write all the pamphlets you want, I will not restrict your speech, the only thing I require is you put an appendix on the back of your pamphlet stating the other side, it never would have been done.

David Brinkley once said,

> There are numerous countries in the world where politicians have seized absolute power and muzzled the press, but there is no country in the world where the press has seized absolute power and muzzled the politicians.

I think it is a travesty, and I concur with the comment made that the gentlemen with their viewpoints left and right and the middle who want access will have exciting access if the broadcasters can be free to do their thing, because they will welcome similar and contrary viewpoints.

Thank you, sir.

The CHAIRMAN. Thank you.

Mr. Saadi.

Mr. SAADI. Thank you.

Mr. Chairman, I appreciate the opportunity to be here. I have seen a lot of changes in the 30 years I have been in the radio business, starting with my home town radio station, which was then the only station that served three parishes in Louisiana. That is what we call counties. Today there are 11 radio stations there, VHF TV coming, and at least four or five channel cable systems, and in addition three or four daily newspapers. None existed at that time.

I am one of the radio broadcasters who I think you characterized as saying, "the heck with it". Our experience with the fairness doctrine, in an admittedly small market, prompts me to call it the fearness doctrine, because of the ease with which anyone anywhere can disrupt our station operations with threats and attempts to intimidate.

Before President Reagan announced as a candidate for President, he hosted a commentary radio show which we used to carry on our station. In 18 months of carrying the program, we never received a single complaint from any of our local audience, not one. We did, however, hear from individuals and groups thousands of miles away from our listening area. Following one of Reagan's commentaries, we received a request for equal opportunity from no less than nine individuals and groups charging they were the victims of personal attack.

Now, when you get that kind of request at a small radio station, you can be sure that everything screeches to a halt. We had spent a lot of time reviewing the tape, playing it over and over again to determine if in fact there were personal attacks. Finally, we determined we would have to get a Washington attorney and discuss it with him. After a lot of time, a lot of effort, and some money expended, we decided to honor their requests, since they asked for only one program to handle all of their requests as a group.

We did not agree there were personal attacks. It was simply, we caved in and did it.

On another occasion we were confronted with a request for air time from a group in Texas who, through their attorneys, submitted a complaint based on comments made in a series of spot announcements by the chief executive of the Weston Co., Mr. Eddie Chiles. They did not single out any individual announcement or any particular thing that he said. Rather, they talked about the things he was implying in his message, rather than the things he spoke.

We were not sure the fairness doctrine extended to interpretations of implied charges, and checking our records, we found we had covered every issue they challenged, and we denied the request.

Senator Packwood, you stated that these regulations chill editorial discretion and cause self-censorship. You are absolutely right. We do not have as small broadcasters, the resources and time, people or finances to deal with fairness doctrine complaints from groups and individuals who are not our listeners, not in our listening audience, and are miles away.

I would like to comment on another provision of section 315 which I believe has failed, the lowest unit rate provision. If I perceive correctly the rationale was to aid in reducing campaign spending and provide candidates not well known to the public an economical way of presenting their views. I think it has failed. Last fall we had an election in Louisiana in which there were 10 candidates, only two of whom were public figures, the former Governor and the incumbent Governor. Those two alone spent in excess of $20 million in that campaign for the governorship of the State of Louisiana. I might add the winner spent $13 million of that, and that was the most money ever spent in the United States in a winning campaign. The lowest unit rate only served to buy more time with the same dollars for those two candidates. The other eight candidates probably did not spend $20,000 as a group, and I doubt whether anyone can recall who any of the eight are today.

Mr. Chairman, just outside our radio station, on Main Street in Houma, La., there is a satellite receiving antenna which belongs to the Associated Press, and for which we lease them land, and space in our building. We get much of our national and local news through that antenna. So does the only daily newspaper in our community, which is owned by the New York Times.

The signal for the newspaper comes into that dish, into our radio station, where it is then connected to a phone line to take it to the newspaper. It is the same news, the same source, the same means of delivery, but receives quite different treatment when it reaches its goal.

I think the newspaper deserves the protection of the first amendment. I think broadcasters do, too.

I thank you very much.

The **Chairman**. Thank you. I appreciate the very personal experience you relate. I suppose if we heard from 100 broadcasters, we would have 100 similar but personal experiences.

Mr. Mell.

Mr. **Mell**. Thank you, Mr. Chairman, and thank you for the invitation to appear here and express my support for S. 1917, the Freedom of Expression Act of 1983.

My name is Dean Mell. I am news director for KHQ, Inc., in Spokane, Wash. I have the responsibility for the news operations of KHQ AM and FM and TV. I am the immediate past president of the Radio Television News Directors Association, a nonprofit professional association of approximately 2,100 journalists and others who are active in the supervision, reporting, and editing of news and public affairs programing on radio and television, both broadcast and cable, at the network and local levels.

I might also add that the RTNDA has been a leader in this effort to repeal section 315, the fairness doctrine and equal opportunity.

I have been a broadcast journalist since 1947 at both the network and local levels. From my own knowledge and experience, permit me to cite reasons why I regard the equal time and fairness doctrine provisions of section 315 as stifling, costly, and nonproductive.

The Federal Register on the fairness doctrine and public interest standards, subtitled Handling of Public Issues, part 3, sits on my desk. It runs 19 pages of small type, three columns to a page, which sets forth Standards of the Communications Act, docket No. 19620. In addition, I have several publications from the National Association of Broadcasters Legal Department explaining in greater detail how certain provisions of the act apply and under what conditions.

These advisories come out periodically as circumstances change or court opinions shade the meanings. I also have a 10-page document published by the Washington State Association of Broadcasters which tries to further explain Washington State law and how the applications of the Communication Act compare and affect Washington State law.

I submit to this committee that the sum total of these and other documents relating to interpretation and implementation of provisions with section 315 are intimidating to me as a journalist. I am not a lawyer. They are discriminatory, because they apply only to broadcast journalists, not to print journalists. And they are self-defeating because they may inhibit me from vigorous journalism.

The provisions of the act rob me of my freedom to exercise my journalist judgment in choosing the issues to probe and how to probe them. A minority point of view, valid in itself, may not get explored if in so doing I would be obligated to seek out and offer comparable exposure to any and all other minority viewpoints about the same issue.

Given the limited resources available to the news department, it just might be deemed wiser to scrap the whole project. That course of action does the community a disservice and would not be necessary except for the intimidating specter of section 315.

In my own community of Spokane, Wash., a competing station had its license challenged during 3½ years of litigation brought on by an accusation that the licenseholder had violated the fairness doctrine. The FCC filed the action against both the station manager as an individual and as general manager of KHOM AM-FM radio and TV. The charge was the result of complaints lodged by eight neighbors who had broken away from an environmental group and were not given comparable air time with the parent environmental group.

Ultimately, the station's license was renewed because the challenge by the ad hoc group was found to be without merit, but during that 3½ year period of litigation, the station manager claims he had damage to his reputation as a manager, was labeled a controversial figure, and ultimately lost his job, and spent all his savings. Furthermore, the investigation consumed more than one-half his time and energy as the station manager, disrupted the entire station staff, adversely affected station morale, and was costly, all of these consequences the result of a filing under the so-called fairness doctrine which 3½ years later was found to be without merit.

I submit to this committee that such an experience by a general manager and the station staff is intimidating and stifles the appetite for new journalistic projects which might later prove to be controversial.

One other station in my market has a standing rule it will not schedule any special preelection programing until after the primaries are over because it simply does not want to deal with the problem of including every person named on a bedsheet primary ballot as section 315 would require.

In summary, my strong belief, based upon 37 years of broadcasting, is that section 315 does not accomplish its goal. The provisions prevent controversial and provocative programing in some instances. It inhibits the airing of minority viewpoints. It discourages responsible public affairs programing. And it is inherently at odds with first amendment guarantees.

There is an Arthur Conan Doyle story in which Sherlock Holmes solves a murder mystery by discovering that "The dog did nothing in the nighttime. Maybe the reason why so many TV broadcasters "do nothing in the nighttime" where public affairs programing is concerned is because they are tethered by the leash of section 315.

Thank you, Mr. Chairman.

The **Chairman**. As I recall, that story is the Silver Blaze, where the great racehorse is stolen and the trainer is killed. The inspector, who forever bumbles in the Holmes stories, thinks he has caught the right man this time. He clearly has not, but he thinks he has. As they are walking down the road, he says, "Is there something else, Mr. Holmes, to which you would like to call my attention." Holmes says, "Yes, the strange conduct of the dog in the night." And he said, "The dog did nothing in the night." That was the strange conduct.

Mr. **Mell**. Commonly referred to as, the dog did not bark.

The **Chairman**. That is correct.

Mr. Cohen.

Mr. **Cohen**. Thank you, Mr. Packwood.

I am general manager of radio station WINZ in Miami, Fla. I am president of the South Florida Radio Broadcasters Association. I have been directly involved in the fairness doctrine through a campaign my station undertook in 1982. WINZ, along with the Dade County Consumer Advocate's Office, began a petition drive. Through these petitions, our listeners asked the Florida Public Service Commission to strongly consider cutting or rejecting a rate hike requested by Florida Power & Light Co.

As a result of this campaign, which was quite successful in keeping electricity rates down, Florida Power & Light filed a challenge to our right to operate, claiming violations of the fairness doctrine and personal attack rules. The power company felt we had taken a strong position on this issue of public importance, without allowing for FPL's fair comment on the issue.

We did, in fact, provide the power company with what we felt was more than adequate response time to tell their story. The FCC apparently agreed, as we were vindicated of any wrongdoing. The issue of the amount of time we allowed Florida Power & Light to rebut our editorials became a large part of the complaint they filed against us.

This is one of the unfair aspects of the fairness doctrine, that we had to account for the time expended on the issue after the fact, comparing it to the amount of time we allowed the power company to air their views. It brings me to the issue of why, in today's media-oriented world, the fairness doctrine is a badly outdated concept.

The idea that the public needs to be exposed to both sides of any issue is a valid one, but what the writers of the fairness doctrine did not consider is the vast amount of media sources presently available to the public. Now there are an infinite number of outlets where anyone can get their news and information.

In the Florida Power & Light case, the facts surrounding both sides of the campaign were published in the newspaper. You can be assured that WINZ carrying the opposing viewpoint was but a small voice compared to all the coverage the issue was given elsewhere.

I feel that Florida Power & Light used the fairness doctrine to provide themselves with a way to create adverse publicity for WINZ. The simple fact that they accused us of violating this rule created the impression that we were wrong in undertaking the issue, even if that wasn't the case. Often the accused party suffers, whether right or wrong, only because they have been accused.

The nuisance created by this experience was compounded by the costs we incurred to defend ourselves—a situation we should not have been placed in. I think we are lucky that our parent company had the resources to defend accusations like this one. I often wonder what would have happened had we been a smaller station without the proper legal counsel or, for that matter, without the means to secure that legal counsel. Had we been a small operator, we would not have been prepared for this experience.

All along we knew we were right. We were advised by our attorneys that we had done nothing wrong. The economic realities of this type of accusation are clear. The fact that we were made to stand accused during a year of embarrassment on a totally inappropriate charge indicates that the doctrine should be repealed.

Any well-programed radio or television wants their audience to hear both side of an issue of public importance. I contend that the public will be kept well informed, if not by one medium, by another in the same marketplace.

Public issues are the meat and potatoes of any good newscast. It should then make sense that news and programing should not be legislated, but should be set free of this unnecessary constraint. I wonder how many broadcasters have hesitated to take a position on an important issue because of the inhibiting effect of this law and what happened at WINZ.

The CHAIRMAN. I think most at one time or another. Again, I am struck with the statement the Arab-Americans attempts to place ads, and the stations unwillingness to take them. I am willing to bet that if there were no fairness doctrine more stations would take it than they do today because of the fairness doctrine.

But you do not know what you are bargaining for when you take an ad like that. Who will demand response time? Who will come to you with no money, will have to give away time? I think you just say: The heck with it, it is not worth it. I have commercial clients, time to fill, and things to do. I am not going to call my lawyer, go to court, and pay $1,000, $2,000, or $5,000 to find out if I can put this ad on. So you do not.

Mr. MELL. That has happened. That has happened, Mr. Chairman, in our station, where commercial advertising has been refused because it was issue-oriented and would have opened a Pandora's box.

The CHAIRMAN. This is an area we have not even touched on yet, the genuine issue-oriented ads, the ads that are not product-oriented. You will not take them, by and large, because you are subject to all kinds of response doctrines.

You can print them in U.S. News, Business Week, the Washington Post. There is nothing obnoxious about the ads. They are a philosophical point of view, which I would think the public ought to be entitled to see and hear, in addition to read. But I know very few stations that will touch them, understandably under the present doctrines. I think if I were in your position I would not touch them either, given that situation.

Mr. MELL. And the sad point—I think Mr. Rowen made the point earlier. The sad point is the issues do not get discussed, then. So the very purpose of having the regulation at the outset is defeated by its very existence.

The CHAIRMAN. Gentlemen, I have no more questions of you. As I said to the other witnesses, it is a privilege to have people here who are in the business, not just writing rules, commenting on them, or even criticizing them. You have to live with them day by day.

I have not asked you to comment about this idea: Why do we not just send down a simple two-paragraph explanation of the fairness doctrine and you can consolidate that with whatever State laws you have. You can use this to decide every case that comes before you, whether it fits into the Zappell doctrine, the Cullman doctrine, fairness, equal time, or whatever.

I know what your response would be.

Mr. MELL. I have some documents here that are political broadcast catechisms. I as a news director, I am supposed to know all of the provisions in this document. And I am not a lawyer, as I say, and it is complex and it keeps changing all the time.

Mr. HOBLER. May I add, most of the candidates have to be briefed on that, also.

The CHAIRMAN. Having been on this committee, having studied the broadcast industry, and having been a candidate for 20 years for State and local office, I have a reasonable grasp of the rules. But any time I start advising a new candidate, you start all over again attempting to educate them as to what their rights are.

As a matter of fact, in the last campaign in Oregon I advised an environmental group. I happened to be on their side of the issue and they wanted my advice, on how to get free time on your stations. This was a major issue involving whether or not we could use leg traps to catch animals.

The environmentalists were opposed to it, and I was on their side of the issue. There was a fair amount of money in favor of it. The environmentalists were not short of money, but they spent all of their money on print. They spent it on direct mail and on things other than broadcasting. They then went to the broadcasters and said: We have no money.

I knew what the broadcasters' response would be. They gave them time. But it was not because the environmentalists did not have money. They had had it. They just realized they should spend it on things where there was no doctrine giving them free time, assuming time had been sold to the other side. All the group had to do was plead poverty and they would get free time.

I advised them to do it because I knew that was their legal right. I am not wild about the doctrine, obviously.

Mr. MELL. One of the down effects of this is the public itself does not understand it. They think they are being served by something when they say, you have to do that because it is required by the fairness doctrine. And when you explain to them, no, I do not have to do that and indeed I will not do that, they are disappointed and frustrated as well. I do not see that it serves anyone's purpose.

The CHAIRMAN. Gentlemen, thank you very much. I appreciate it.

We will take Ms. Donnelly now and then we will conclude with the last panel.

As I recall, Ms. Donnelly, you were here last year.

STATEMENT OF ELAINE DONNELLY, SPECIAL PROJECTS DIRECTOR, EAGLE FORUM

Ms. DONNELLY. Yes, last April. Not on this subject, another subject.

The CHAIRMAN. You were a good witness.

Ms. DONNELLY. Thank you.

I appreciate your understanding of the delay of my flight. I am delighted to be here. I only regret I could not hear the previous witnesses. However, I have read the testimony from the 1982 series of hearings.

Mr. Chairman and members of the Senate Commerce Committee, I am Elaine Donnelly of Michigan, special projects director of Eagle Forum. I have more than 11 years of experience in the practical applications of the Federal Communications Commission's fairness rules, and I have participated in numerous FCC rulemaking proceedings. I am the author of the handbook "One Side Versus the Other Side—a Primer on Access to the Media," which has been successfully used by grassroots activists all over the country since 1981.

Arguments for the deregulation of television may sound very persuasive, but only from the perspective of those fortunate few who happen to own or control television stations. The fact is that broadcasters do not own the first amendment, even if they think they do.

Actually, there are three groups with an interest in the concept of free expression: A, broadcasters; B, individuals and candidates who need access to the airwaves; and C, members of the general public who need to be informed as citizens and voters. All three groups are important, but the U.S. Supreme Court ruled in 1969 that the rights of the third group, the public, are paramount.

Please remember that broadcasters are in a position to greatly diminish the first amendment rights of the other two groups. New technologies that are not universally available do not change the fact that no one can gain access to television unless the time is given or sold to them by station managers.

Let me give you just one concrete example. At the end of over 10 years of debate over the proposed equal rights amendment, a survey of the official video record of evening network news programs showed that out of 11 hours of total coverage from March 1972 to June 1982, 95 percent of the time was devoted to spokespeople for the pro-ERA side, while opponents appeared only 5 percent of the time.

If it were not for the fairness rules that the women of Eagle Forum invoked at the local level as a means to exercise our rights of free speech, it is entirely possible that the ERA would have been ratified without any real public understanding of its true effect. That would have been unfair to women and the general public, which has the paramount right to be informed about this and other issues of the day.

Incidentally, the same argument could be made if I were standing here representing the National Organization for Women, the proponents of ERA, if their side had been the one held to only 5 percent of the network news coverage. The fairness rules are neutral in their impact, available to liberals and conservatives, pros and cons alike, no matter what the issue might be.

Mr. Chairman, the Supreme Court ruled in 1969 that censorship of a medium not open to all is no more acceptable than censorship by the Government—*Red Lion Broadcasting*. vs. *FCC*. The Court upheld the minimal fairness rules as a means to protect a true marketplace of ideas, which should not be confused with the lucrative commercial marketplace of broadcasting.

The testimony you have heard about new technologies, such as teletext, videotext, and direct broadcast satellites, is most intriguing, but it does not change the fact that surveys show that over 65 percent of the people still get most of their information from conventional "free" television. This percentage is not likely to change because space-age technologies are expensive and the demand is already leveling off because of that expense. Mr. Chairman, we cannot afford to become a nation of information haves and have-nots.

It is the height of bureaucratic arrogance to suggest that the first amendment rights of the public will be served if only every household is wired for cable TV at the rate of at least $16.50 per month for starters, or if everyone buys a home computer or an earth station costing several hundred dollars plus an additional monthly charge. The suggestion that ordinary people will have to pay dearly for access to diverse points of view on television is tantamount to suggesting that everyone has the right to vote, but only if they can afford to pay a poll tax for the privilege.

Please remember that the broadcasting networks enjoy a unique monopoly that cannot be equalled by the print media. Among local newspapers, there is no equivalent to the impact and dominance of the network news programs. The networks offer only one commentator per program, such as Bill Moyers on CBS and John Chancellor on NBC. Affiliate station managers who usually limit their editorial to local issues are no competition for the media giants, nor are the cable stations and community access programs that are midgets in the world of media giants.

S. 1917 would greatly expand the rights of broadcasters to deny the first amendment rights of others. Suggestions that people who are being censored out of the media should go out and buy a TV or radio station is the modern electronic equivalent to Marie Antoinette's "Let them eat cake."

Mr. Chairman, if S. 1917 is enacted stations would be free to sell all of their time just before a local, State or national election to one party's nominees, at bargain rates, to the exclusion of all of the other party's candidates from the President on down.

Would any Senator on this committee be content to buy commercial time for his next campaign on a dozen 5-mile radius low-power stations, instead of the most-watched network affiliate stations in the State? I think not. That would be effective censorship, a violation of your rights and that of the public.

In my opinion, the various complaints of station managers and broadcasters that have been expressed before this committee are utterly unconvincing. Anyone who takes the time to study the fairness rules as printed can see just how minimal they are.

In conclusion, the issue here is the idea that the fairness rules of today are carefully balanced to protect the rights of broadcasters as well as other parties with an interest in the first amendment. If these reasonable guidelines to protect the public interest are sacrificed on the altar of the commercial marketplace, the true marketplace of ideas would be narrowed to serve the interests of only those with power, influence or popularity among the media elite.

The CHAIRMAN. I must say that this is one candidate who looks forward to the opportunity of having all of the 5-mile radius low-power television stations inplace, because the answer to your question is: You bet. I am going to buy my time there.

Ms. DONNELLY. Instead of the affiliate stations?

The CHAIRMAN. Maybe, maybe not. But I am clearly going to buy time there because I can very narrowly target my ad to a listening audience in a very small geographic area. That is a much greater advantage to me than a generic ad that I put on at an infinitely higher price for all people to watch.

I will be able to target audiences just like direct mail, as we do in with some radio stations now. When you advertise, you go to the local radio station. I advertise in Coos Bay, Oreg., North Bend, Oreg., or Newport, Oreg., and I can talk about what I have done for Newport. I cannot do that if I buy time on the biggest affiliate in Portland and broadcast over half the State.

Ms. **Donnelly**. Mr. Packwood, I think you misunderstand my point. I agree with you, low power can serve a very useful purpose. But how would you feel if the station managers did not like you? Maybe they did not think you were the best Senator for Oregon. Perhaps they had another favorite, and they decided to block you out, to censor you from the airwaves. Under your bill they would have the right to do that.

The **Chairman**. That is correct. That brings me to my next question. You say, "I know from personal experience how easy it is for a broadcaster to deny free expression to those whose views do not agree with the media elite."

Do you think all of these local broadcasters have the same views and that they will all keep me off of their stations?

Ms. **Donnelly**. No. It has been my experience that local broadcasters are largely very fair men. They do want to do the right thing. I have, in using fairness rules, never had a broadcaster say no, because they are all different, and many of them will provide fairness in one way, others in another way.

Some are more reasonable than others, some are a little more hostile, but they always come back to their basic responsibility in good faith. And I have never had a real problem anywhere in the country, in working with station managers and grassroots activists.

The **Chairman**. Would they not do that with or without a Fairness Doctrine?

Ms. **Donnelly**. If we did not have the fairness rules, in my opinion we would not get in the door.

The **Chairman**. Why?

Ms. **Donnelly**. Because the point of view that Eagle Forum expressed on the one issue I named is not in favor with the media.

The **Chairman**. And that includes all of the media managers in the city? I was just trying to figure out which channels I can get here. I see Mr. Pfeiffer will testify next and he might be able to help me out. I do not have cable, but I can get channels 4, 5, 7 and 9 in Washington, and 11 and 13 out of Baltimore, 20 and 26 on UHF here. I do not remember what else I can get, but there is more than I can watch.

Is there some kind of a cabal among all of their managers? Do they all have the same view, do their reporters all share the same views, and will they all shut out someone uniformly?

Ms. **Donnelly**. No, that is not the word I used, Senator Packwood. But I invite you again to look at the statistic of the network coverage MERA. Ninety-five percent went to the pro side, and the same type of, I would say, straight news coverage was also reflected at the local level.

We were able to counter that because we did ask for fairness and in one way or another we got just enough so that we were able to win.

The CHAIRMAN. Why could you not get it out of the networks?

Ms. DONNELLY. Why? Well, we got a minimal amount, perhaps, on some of the talk shows. I am talking about the evening news shows. It is harder to do.

But it is because the local station affiliates are subject to the fairness rules that we had some leverage with the networks. And in my personal opinion, I think the networks should be subject to fairness rules also.

The CHAIRMAN. They are.

Ms. DONNELLY. Only the local affiliate stations are.

The CHAIRMAN. You are technically right. That interestingly, comes back to the Carter-Mondale case, as to whether the network could be compelled to take political advertising. They did not raise the defense that they are not licensees. In theory, the networks are not subject.

Ms. DONNELLY. That is right.

The CHAIRMAN. That is in theory only, and the networks pay very close heed to what the FCC says. Indeed they worry about it tremendously because they own stations and have affiliates all over the place.

I raised this issue with a lawyer from the network side and asked why did you not use that defense? He said they thought about it. It was not an oversight. They thought about it and did not do it deliberately.

Ms. DONNELLY. I agree with you. In many cases I think the problems broadcasters run into is because they do not understand fairness rules. Broadcasters think the rules are much more restrictive than they really are, and many activists at the grassroots do not realize how useful they can be.

The CHAIRMAN. You are convinced that local stations would be more conformist rather than less if they did not have the fairness rule. You believe that the fairness rule guarantees some diversity and some access that you would otherwise not get?

Ms. DONNELLY. Exactly, and I know this from over 10 years of personal experience. I can recall, for instance, the International Women's Year Conference in Houston, when all of the pro-ERA leadership decided they would not appear on any network shows unless the networks agreed not to interview anyone on our side. The only reason the networks were able to prevail and the local station affiliates was because of the fairness rules.

Of course, the major morning programs, "Good Morning, America," they were all there in Houston. It was like a political convention. But there was some minimal amount of fairness we were able to have access to at the network level, which was carried by the local stations. And also, many people at the local level received fairness both before and after Houston, and I know this from personal experience.

Let me give you another example. On the vote before the ERA time extension, Alan Alda the actor got together a number of his Hollywood friends on a syndicated program, no longer on the air, and he had a phony news conference. It took 20 minutes of network time, virtually all of the affiliates on NBC, and he said:

> This vote on the ERA time extension is coming up. We want all the people watching this program to get their calls and letters in immediately so we can get the ERA time extension passed.

It so happened I was here in Washington and I spoke to the head of the Complaints and Compliance Department, which I have not usually had to do. I have found that threats are not really useful. It is an attitude of cooperation that is much more useful. He indicated to me that just because Mr. Alda was a celebrity and just because his program was not a news program, it still was subject to the fairness rules, and as a result of that we had a representative on the air before the vote, which was very important, and we did get some measure of fairness.

Mr. Chairman, the rules do work as long as people know how to use them and if they have a basic understanding. And by the way, what your environmentalist friends did in your State I think was wrong. I do not believe that any group has the right to go out and buy print advertising or put money into that area and then go in and ask for free time for commercials.

The CHAIRMAN. You do not think they have the right in the sense of it being moral, or you do not think they have the right in the legal sense in that they can go to the broadcasters and demand the free time?

Ms. DONNELLY. I do not think they can demand the free time if they have paid for advertising elsewhere. The broadcaster can see if there is a big ad for that particular group's point of view. He can say, "Well, you are not approaching me in good faith." This is not what the fairness rule demands.

The CHAIRMAN. You are the local broadcaster in Moran, Oreg., with a radio station and they come to you, and you do not know whether the fairness doctrine applies or not. What are you going to do?

Ms. DONNELLY. Then you should do a little homework. It was said here, a lot of people do not understand the fairness doctrine or cannot summarize it. Let me summarize it. It is one sentence in the book I wrote:

> The Fairness Doctrine means that broadcasters must make affirmative efforts to extend reasonable opportunities for the presentation of contrasting viewpoints on controversial issues of public importance in the course of their overall programming.

In one sentence, that is the essence of it. How it is interpreted is a matter of good faith, according to the variety of programing at the local level. It is a basis for cooperation and not for threats, by the way. I find that threats are not even useful.

Broadcasters know they have a responsibility to the public. It is not the right of myself or of someone else to get on the air that matters. It is their responsibility to the public. I have never encountered a real problem in working at the local level.

But if you take away the fairness rule, we do not have a prayer.

The CHAIRMAN. I cannot remember whether you came in by the time Mr. Cathell, who represented the National Association of Arab-Americans, had testified or not.

Ms. **Donnelly**. No, I am sorry, I missed his testimony.

The **Chairman**. They wanted to place a great variety of ads on television and on radio in opposition to our country's position on providing foreign aid to Israel. They were turned down frequently. They could not get their ads on.

Many of the broadcasters cited the Fairness Doctrine. They did not want to put the ads on. Most of the broadcasters who have testified so far indicated that if they did not have to worry about the Fairness Doctrine they would have been more inclined to take those ads.

Do you think that is not true?

Ms. **Donnelly**. I think the broadcasters do not understand the rules. There is no reason they cannot carry that ad, provided that in another place in their overall programing they presented an opposing view. If there is another group that wants to put an ad on, fine.

The **Chairman**. And possibly present it for free if they cannot find someone who will pay for it.

Ms. **Donnelly**. If they don't have public information programing, sometimes that is the case. There are a number of different ways that fairness can be implemented. And broadcasters know, or should know, that they are the ones who decide how they will be implemented. The Government does not look over their shoulders and watch their program all of the time. That is ridiculous.

The **Chairman**. Let me ask you about issue advertising. Should broadcasters be able to take it without having to give away time in response to that issue?

Ms. **Donnelly**. It depends on what the situation is. In Michigan there was a bill, or I should say a ballot proposition, to ban nonreturnable bottles. In this case the conservation group did not have the funding that the big brewers and bottlers had, and the brewers and bottlers bought a lot of advertising time.

And the conservation group asked for some free time. They did not have any print advertising, either. It was a genuine case where they needed help getting the message on the air. And they too won their case, and Michigan was one of the first States to ban nonreturnable bottles.

It does not matter what side of an issue is; people can utilize the fairness rules. We had another situation with State legislators fighting a tax increase. We had a lot of public employee unions spending a lot of money to advertise for that tax increase. It was a ballot proposition, and the State legislators asked for some, not equal time but some amount of time to balance the advertising of the well-funded side, and it worked.

The **Chairman**. I do not agree with that philosophy. Those are ballot issues. I am talking about the issue ads that Mobil for example wants to place. These are basically free enterprise ads. If the networks take them or local broadcasters take them and there is no paid response, they are subject to giving someone time to reply to that free enterprise ad.

Ms. **Donnelly**. I am not sure that is the case. If there is an opposing party that has funding, there is no obligation to give free time. I think some people take advantage of these rules and that is why they are subject to so much attack right now.

The **Chairman**. Sure, there may be someone out there who has the money. Let us say the Communist Party has money. They are legal in this country. They do not choose to buy an ad. The obligation of the radio or television station is to go around and find someone. There is no way they can compel the Communist Party to place the ad.

If they do not find someone who will buy it, they are subject to putting on some kind of response at their own expense.

Ms. **Donnelly**. I do not believe that that is the case when you are talking about a political party.

The **Chairman**. I am not talking about a political party. You mean if the Communist Party——

Ms. **Donnelly**. You mentioned the Communist Party. Did I misunderstand?

The **Chairman**. I will pick another one. I just used it as an example. Pick another philosophical group that does not agree with Mobil's free enterprise ads. They have money, but they do not want to buy an ad. They choose not to do it. What does the station do then?

Ms. **Donnelly**. It depends on what the ad is. If they have somewhere in their programing a presentation of the opposing view, they have no obligation to give free ads.

The **Chairman**. You have seen these ads. You know what I am talking about?

Ms. **Donnelly**. No, as a matter of fact. I have read of them, but I have not seen them.

The **Chairman**. They appear in the paper frequently. They are basically free enterprise ads. They are not lobbying for a particular issue or a piece of legislation. They are generic, philosophical ads. And you were saying that it does not bother you that the station has to put on some contrary position, whether it be by advertising or, if they cannot find advertising and they do not want to give away time to someone else, they have to put on some kind of programing in response to that ad.

Ms. **Donnelly**. I have no problem with that. It is not a matter of equal time or equal commercial space or anything of the kind. They are so flexible. These rules are not the noose around the broadcasters' neck they are made out to be.

And in most case there is no problem anyway, because they have had people who represent a leftist point of view, who are critical of the free enterprise system, and if they know they have done that they have nothing to fear and no one is going to take away their license.

The **Chairman**. And some think those people get all the time they need on the air anyway.

Ms. **Donnelly**. You have a wide variety of programing on the air.

The **Chairman**. I think the media elite probably favors those kind of people and puts them on.

Ms. **Donnelly**. I think there is a problem with media bias. There was a study done some time ago—the 1973 lichter/Rothman study published in Public Opinion—I am sure you are aware of it—about the voting records and background of people in the media. I do not know what would change that, but I do feel there is a need for fairness rules so people can have access to what air space there is.

And by the way, I think there has been a lot of crybaby testimony here or alarmist, Chicken Little type testimony; for example, it's been suggested that if we have fairness rules relating to broadcasting that means the Wall Street Journal, because it transmits by satellite, will be subject to the same rules. Well, I think this is sheer hysteria.

Even if such a thing were done by the Supreme Court, and it never has, Congress would have the right to fix that, and I think to take that as a reason to do away with fairness rules is to look at the worst fears of the powerful minority and overlook the needs of the other two groups that I mentioned, namely people who need access to the media and the public that has the right to hear all sides.

To me, that is the essence of the first amendment. It does not belong to broadcasters alone.

The **CHAIRMAN**. I have no further questions. As usual, you are a well-informed, enthusiastic witness. Thank you.

Ms. **DONNELLY**. Thank you. I appreciated it, Senator.

[The statement follows:]

STATEMENT OF ELAINE DONNELLY, ON BEHALF OF EAGLE FORUM

Mr. Chairman and members of the Senate Commerce Committee, I am Elaine Donnelly of Michigan, Special Projects Director of Eagle Forum, a national organization of activist women and men that has been leading the pro-family movement since 1972. I have more than eleven years of experience in practical applications of the Federal Communications Commission's Fairness Rules, and I have participated in numerous F.C.C. Rulemaking Proceedings. I am the author of the handbook "One Side vs. the Other Side—a Primer on Access to the Media," which has been successfully used by grassroots activists all across the country since 1981.

Arguments for the deregulation of television may sound very persuasive, but only from the perspective of those fortunate few who happen to own or control television stations. It is understandable that broadcasters want even more power and the right to be accountable to no one, but I cannot understand why the interests of the two other parties concerned in this matter have been almost totally ignored in the testimony presented to date before this committee.

Mr. Chairman, I appreciate this opportunity to remind the members of this Committee that broadcasters do not own the First Amendment, even if they think they do.

Actually, there are three groups with an interest in the concept of free expression: (a) Broadcasters; (b) Individuals and candiates who need access to the airwaves; and (c) Members of the general public who need to be informed as citizens and voters. All three groups are important, but the U.S. Supreme Court ruled in 1969 (Red Lion Broadcasting vs. FCC) that the rights of the third group—the public—are paramount.

Please remember that broadcasters are in a position to greatly diminish the first amendment rights of the other two groups. New technologies that are not universally available do not change the fact that no one can gain access to television unless the time is given or sold to them by station-managers.

As an activist woman who has been involved in the public debate surrounding a number of controversial issues of public importance, I know from personal experience how easy it is for a broadcaster to deny free expression to those whose views do not agree with the "media elite". Let me give you just one concrete example. At the end of over ten years of debate over the proposed Equal Rights Amendment, a survey of the official video record of evening network news programs showed that out of 11 hours of total coverage from March, 1972 to June, 1982, 95 percent of the time was devoted to spokespeople for the pro-ERA side, while opponents appeared only 5 percent of the time.

This shocking record of biased coverage on that issue alone demolishes the self-serving testimony of network correspondents like CBS's Dan Rather who appeared before this Committee last year to complain about the unfairness of the Fairness Rules. Dan Rather, the National Association of Broadcasters, and the other media moguls that you have heard from are not just ordinary citizens. Their power to influence public opinion by setting the agenda of public discussion is far "more equal" than that of the rest of us.

It was bad enough that the opponents of ERA enjoyed only 5 percent of the network coverage over a period of ten years, but it was even more hurtful that in most of the coverage overall of those difficult years, the broadcast media managed to almost totally conceal from the American people the important and undisputed information that passage of ERA would have resulted in the drafting of women for combat duty in a future war. If it were not for the Fairness Rules that the women of Eagle Forum invoked at the local leval, as a means to exercise our rights of free speech, it is entirely possible that the ERA would have been ratified without any real public understanding of its true effects. That would have been unfair to women, and to the general public which still has the paramount right to be informed about this and other issues of the day.

Incidentally, this same argument could be made by proponents of ERA, if their side has been the one that was held to only 5 percent of the network news coverage. The Fairness Rules are neutral in their impact—available to liberals and conservatives, pros and cons alike—no matter what the issue might be.

Mr. Chairman, the Supreme Court rule that censorship of a medium not open to all is no more acceptable than censorship by the government. Nevertheless, statements in favor of concepts such as objectivity in journalism, professional ethics, fairness, and the responsibility of braodcasters to serve the public interest by allowing conflicting viewpoints to be heard are conspicuously absent in your hearing record to date. The Supreme Court upheld the minimal Fairness Rules as a means to protect the true "marketplace of ideas", which should not be confused with the lucrative commercial marketplace of broadcasting.

The testimony you have heard about new technologies such as Teletext and Direct Broadcast Satellites is most intriguing, but it does not change the fact that surveys show that over 65 percent of the people still get most of their information from conventional "free" television. This percentage is not likely to change because space-age technologies are expensive, and the demand for them is already leveling off because of that expense. Mr. Chairman, we cannot afford to become a nation of information "haves" and "have-nots".

Joel Chaseman, President of the Post-Newsweek Stations, Inc. suggested in a speech before the Town Hall of California (Los Angeles, January 27, 1981) that "the Federal Communications Commission has become a home for technology hedonists, falling in love with each new development they meet, committed to none, apparently believing that invention is the mother of necessity." Mr. Chaseman declared in that speech that it is the height of bureaucratic arrogance to suggest that the First Amendment rights of the public will be served if only every household is wired for cable TV at the rate of at least $16.50 per month (for starters), or if everyone buys a home computer or an earth station costing several hundred dollars plus an additional monthly charge. The suggestion that ordinary people will have to pay dearly for access to diverse points of view on television is tantamount to suggesting that everyone has the right to vote, but only if they can afford to pay a poll tax for the privilege.

Please remember that the broadcasting networks enjoy a unique monopoly that already distorts the marketplace of ideas in a way that cannot be equalled by the print media. Among local newspapers, even those owned by the big publishing conglomerates, there is no equivalent to the impact and dominance of the network news programs. Local newspapers can set their own agendas of editorial discussion, and choose from a vast spectrum of additional "op-ed" pieces from columnists that reflect the wide diversity of opinion on national issues of the day. Time rules that are necessary ensure fair elections and an informed electorate. If S. 1917 is enacted, stations would be free to sell all of their time just before a local, state, or national election to one Party's nominees, at bargain rates, to the exclusion of all the other Party's candidates from the President on down. How would the public be served if broadcasters could use their monopoly of the airwaves to endorse candidates, allow personal, unanswered attacks against opposing candidates, and to censor those opposing candidates right off the air without any responsibility to anyone?

By constrast, the networks offer only one commentator per program, such as Bill Moyers on CBS and John Chancellor on NBC. Affiliate station managers who usually limit their editorials to local issues are no competition for the media giants; nor are the cable stations and community access programs that are midgets in the world of the media elite. It is important to remember, too, that the same giants that have dominated the communications industry to date, such as Time, Inc., Warner-Amex, Westinghouse, and networks such as ABC are now using their considerable economic clout to take over cable TV and other systems, in the same way that many newspapers have been swallowed up by the big conglomerates.

The testimony you have heard about how much easier it supposedly is to buy a television station than it is to buy a newspaper is entirely beside the point. What about the First Amendment rights of those who are not in a position to buy either?

99.9 percent of the candidates and issue advocates in this country can always buy a paid newspaper ad or produce their own publication, but they cannot have access to television unless someone gives or sells the time that is needed. S. 1917 would greatly expand the rights of broadcasters to deny the First Amendment rights of others. The de-regulators' suggestions that people who are being censored out of the media should go out and buy a TV or radio station is the modern electronic equivalent of Marie Antoinette's "Let them eat cake".

EQUAL TIME RULES

In addition to abolishing the Fairness Doctrine that relates to the coverage of controversial issues of public importance, S. 1917 would abolish the Equal Time rules that are necessary ensure fair elections and an informed electorate. If S. 1917 is enacted, stations would be free to sell all of their time just before a local, state, or national election to one Party's nominees, at bargain rates, to the exclusion of all the other Party's candidates from the President on down. How would the public be served if broadcasters could use their monopoly of the airwaves to endorse candidates, allow personal, unanswered attacks against opposing candidates, and to censor those opposing candidates right off the air without any responsibility to anyone?

Would any Senator on this Committee be content to buy commercial time for his next campaign on a dozen 5-mile radius low-power stations, instead of the most-watched network affiliate stations in the state? That kind of effective censorship, as authorized and encouraged by passage of S. 1917, would constitute a violation of your First Amendment rights of free expression, and there is no way that that would serve your interest or that of the public.

The Equal Time rules have sometimes been cumbersome, and it has been necessary to adjust and reinterpret their meaning from time to time in order to protect the rights of both the major and minor candidates. However, the total elimination of Equal Time rules would serve only to expand the power of broadcasters, moneyed interests, and those who have favor with the decidedly liberal media elite. (For a scholarly analysis of the liberal leanings of the recognized media elite, see the 1983 Lichter/Rothman study published in Public Opinion.) Our entire system of free and fair elections could be permanently distorted as a result.

THE EXAGGERATED COMPLAINTS OF BROADCASTERS

In my opinion, the various complaints of station managers and broadcasters that have been expressed before this Committee are utterly unconvincing.

Anyone who takes the time to study the Fairness Rules as printed in the Federal Register can see just how minimal they really are. For example, the Fairness Doctrine does not require equal time, and the F.C.C.'s skimpy record of enforcement demonstrates that station managers have little to fear from the bureaucrats in Washington. Actually, anyone who has filed a legitimate complaint with the F.C.C. knows that the Commission is one of the weakest and most ineffective agencies in the government. Contrary to the impression given by some of your previous witnesses, the government does not monitor what goes on the air; the broadcaster-not the government-has the sole right to decide how the general principles of fairness in the public interest are to be met. The only reason that the rules work at all is because they serve as a useful standard and starting point for cooperation between station managers, those who seek access to the media, and the general public that has a right to expect free access to the "marketplace of ideas".

If a station manager feels that it is too much to ask that he allow the public to hear a variety of opinions, then he should exercise his option to sell the station to one of the many applicants who would like to take his place.

Witnesses before your Committee have expressed great alarm at the prospect that electronically-transmitted newspapers are threatened by an all-powerful bureaucracy that could step in and tell them how to run their newspaper. I have not encountered so much paranoia since I read the story of Chicken Little. Even if the Supreme Court upheld this fearsome intrusion into the realm of the print media (and it hasn't), Congress would have all the power in the world to resolve the problem.

The sky is not about to fall on the Wall Street Journal or USA Today. There is no reason for panic, or legislation that ignores the interests of the majority while catering to the wildest fears of the powerful minority.

Mr. Chairman, the Fairness Rules of today are carefully balanced to protect the rights of broadcasters as well as other parties with an interest in the First Amendment. If these reasonable guidelines to protect the public interest are sacrificed on the altar of the commercial marketplace, the true marketplace of ideas would be narrowed to serve the interests of only those with power, influence, or popularity among the media elite.

The CHAIRMAN. Now, let us conclude with Mr. Pfeiffer, Mr. Hinshaw, Mr. Lane and Mr. Whitlock.

Mr. Pfeiffer, let me ask you, what other channels can I get in this area besides 4, 5, 7, 9, 11, 13, 20, and 26?

STATEMENT OF EDWIN W. PFEIFFER, VICE PRESIDENT AND GENERAL MANAGER, STATION WDVM-TV, WASHINGTON, D.C.

Mr. PFEIFFER. The fact that you can get that many is awfully depressing to me.

The CHAIRMAN. Depressing?

Mr. PFEIFFER. No, I think you have covered most of them. There is of course a local Super-TV over the air. I am not sure whether you mentioned that or not.

The CHAIRMAN. I am not sure I can get that, but I get all the others with no problem.

Mr. PFEIFFER. Scarcity is hardly the word. Of course, with the advent of cable around the corner in the District as well as in some of the other jurisdictions, that situation——

The CHAIRMAN. I have never yet lived in an area with cable. I live in Montgomery County at the moment, and I have a feeling I will live there a long time before I get cable.

Go right ahead.

Mr. PFEIFFER. Well, I appreciate your having me here. My name is Edwin W. Pfeiffer. I am vice president and general manager of the Evening News Association, which is WDVM-TV here in Washington.

I have been invited to participate in this proceeding because I have recently experienced firsthand, in connection with channel 9 program decisions, the extreme difficulties which are imposed on broadcasters by certain aspects of the current equal time laws.

And since I have submitted this statement and it will be in the record, I thought that I would depart from it and kind of recount that circumstance which we went through in the past week, which I think demonstrates quite markedly that the position a broadcaster finds himself in and the way he reacts to it is markedly different than that pictured by some of the earlier adversaries to S. 1917.

For example, what comes through in a number of those statements is that if there is anything consistent about the character and personality of broadcast station managers, it is that they are especially covetous of their ratings or audience they reach, they are kind of greedy about the money part of it, and if they do not have either of those concerns they must have some special interest, which may be something having to do with politics or some other field.

In this particular case, which involved the clearance or nonclearance of a segment of the Phil Donahue Show which included Rev.

Jesse Jackson which was to air on our station approximately January 16, in dealing with that and in noting a subsequent newspaper article which had been written about the matter, since we eventually did end up not carrying the program, a man named Andy Schwartzman, who is the executive director of Media Access Project, a nonprofit public interest law firm, was quoted as saying that probably they, the station, would not mind there being a little bit of a furor about the equal time laws because they are unhappy about them; it is an easy scapegoat.

So somehow you could not find any reason in the usual family of reasons, so the reason he found that we made the decision that we did in this case was it is just that we are against the equal time laws and that all by itself became a reason for the decision we made.

I might add, the reporter told me when he called on the phone that he had indicated that the reason we did this was because we were overly cautious, because certainly nobody else was going to come in and ask for equal time. Easy for him to say, of course. We were the ones who had to deal with it.

The way the process went, however, was that people who were subordinate to me in our organization had received information about this program some 2 or 3 days before I did. They analyzed the matter. It finally got to me when they decided we could not carry the program without making equal time available to at least seven other candidates who were well-known because of the New Hampshire primary and other activities in the press.

I was appalled when I heard that, because the carrying of Jesse Jackson in Washington, D.C., on the Donahue Show seemed to me to be an excellent opportunity for a very interesting program serving particularly the people we serve here. I could not believe it when they said we finally got to the position where we cannot feel we could recommend we carry it.

So we went through a long process with our lawyers, back to the primer that was held up here earlier, and finally, to make a long story short, some 10 to 12 hours in all of the hours that were spent on this matter, we finally decided, no, that a substantial showing had been made, that we would make ourselves vulnerable to the equal time requests and then have to go through the whole process with each of the other candidates who might be interested in an hour's free time in Washington, notwithstanding the interest of our audience at 9 o'clock on Monday through Friday, who might not be that interested in having that much of a program interruption affect their lives.

We had paid for the program, so it had nothing to do with finances. We were deprived of running a program which we felt would be a significant and relevant program, particularly to the area we serve. And yet we did not do it.

If there is anything that I think is characteristic of us broadcasters, at least as a partial result of the equal time rules, it is that we seem to respond under this environment in a way that can only be marked by timidity. I think the sooner we get rid of the things that cause us to be pushed in that direction, the better off we will be.

The **Chairman**. The situation you describe here includes eight Democratic candidates. As I recall there are more candidates qualified than that on the New Hampshire ballot running for the Democratic nomination. There are eight principal Democratic candidates.

Mr. PFEIFFER. Yes, sir.

The CHAIRMAN. That exact situation illustrates what I referred to earlier about primaries for most local offices. That is the situation, where you have 3, 4, 5, 6, 7, 8, 9, 10, who knows how many, candidates filing for auditor, commissioner, sheriff, city councilman. I see them on the ballots in primaries.

For you to be be able to carry 1 or 2 who in your view are serious candidates, you have to put on 10 or 12 that no one regards as serious. And finally you decide to put no one on.

Mr. PFEIFFER. I might just add, sir, that in this whole analysis of the matter on several occasions we would get confused by the wording in the regulations. So we would call our lawyer and he would say, well, he did not know. And we would say, check with the FCC and see what they say. He would check with the FCC and get back to us, and I was really surprised to find his response was, the FCC is in no position to make a judgment because of the nature of the language in the regulations to begin with.

So we could not even get guidance by the FCC. It is almost like someone going to the FBI to find out whether a bank robbery will be all right and the FBI says, go do it first and we will tell you then whether it is all right or not. That is ludicrous, of course, but it is not too far away from that.

[The statement follows:]

STATEMENT OF EDWIN W. PFEIFFER, VICE PRESIDENT AND GENERAL MANAGER, STATION WDVM-TV, WASHINGTON, D.C.

My name is Edwin W. Pfeiffer. I am Vice President of The Evening News Association and General Manager of its Washington, D.C. television station, WDVM-TV (Channel 9).

I have been invited to participate in this proceeding because I have recently experienced firsthand, in connection with Channel 9 program decisions, the extreme difficulties which are imposed on broadcasters by certain aspects of the current "equal time" laws.

The particular instance that I will address today involves the decision of Channel 9 not to broadcast a program produced by the syndicators of the Phil Donahue" show involving a lengthy appearance by presidential candidate Jesse Jackson. The Donahue program was originally scheduled to be carried by Channel 9 on January 19, 1984. Approximately a week before that date our station received a mailgram from the producers of the program alerting us to the fact that local stations should confirm the feasibility of presenting the program in light of the applicability of political broadcasting laws. Our subsequent investigation of the impact of those laws led us to cancel the program for the reasons generally described in an ensuing article in the January 19, 1984 edition of The Washington Post.

As the Post article reflects, Channel 9 concluded, upon advice of its counsel, that presentation of the hour-long Jesse Jackson program might involve a significant risk of having claims for equal opportunity submitted by numerous other competing candidates for the Democratic presidential nomination—each of whom would be claiming a right to one hour of free time on the station.

I am attaching[1] a copy of the Federal Communications Commission (FCC) regulation which was applicable to our circumstances. In general, this regulation provides that in connection with candidacies for President and Vice President, the candidates for information must (a) make a public announcement of candidacy; (b) be eligible to hold the office under the Constitution and other laws; and (c) must have qualified for the primary or presidential preference ballot in the state in which they are running, or have made a "substantial showing" of bona fide candidacy in that state, territory or the District of Columbia. If candidates qualify in 10 or more states (or nine and the District of Columbia), they will be considered legally qualified candidates for nomination in all states, territories and the District of Columbia.

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[1] See Section 73. 1940 para. 5.

As of the date when we first asked our attorneys to advise us on this matter (January 13, 1948), they provided an initial opinion that the "equal time" provisions of the law would not be applicable to Jackson's appearance on the "Phil Donahue" show, since they believed that Rev. Jackson probably had not qualified in 10 or more states, and probably had not made a "substantial showing" of bona fide candidacy in the District of Columbia. Upon further checking with various sources (a time-consuming process), they were able to confirm that Rev. Jackson had only qualified for the primaries in three states. However, our attorneys were not able to locate spokespersons for the Jackson campaign until Monday, January 16, 1984. They were informally advised at that time that over the weekend (January 14-15) Rev. Jackson's representatives in the District of Columbia had in fact undertaken numerous activities to make known his interest in the February 4, 1984, District of Columbia Democratic Caucus. For example, we were told that the Jackson campaign organization opened a District of Columbia campaign headquarters on January 15, 1984, and held a large number of fund-raising events over that weekend.

As a consequence we were told on January 16 that it was possible that there would be requests for equal time following a Jackson appearance on the "Donahue" program, based on a contention that the Jackson campaign had reached the level of a "substantial showing" in the District of Columbia prior to January 16, 1984. Of course, the definition of "substantial showing" is unclear to me and to our lawyers. There is even the possibility that nationwide network television appearances by candidates, such as the recent appearance of Reverend Jackson and other Democratic candidates in the New Hampshire debate, will be construed as contributions to those candidates' "substantial showing" in the District of Columbia and the states in which such television programs are viewed.

During this period our attorneys also spoke with a legal representative of the "Donahue" program, and learned that a number of other stations had declined to carry the program for the same reasons that were creating legal difficulties for us.

In order to ascertain whether Rev. Jackson's adversaries would be legitimately entitled to claim "equal opportunities" (which would oblige us to give them approximately one hour of free time so as to balance the Donahue appearance of Rev. Jackson), it would have been necessary for us to undertake a study of the qualifications and activities of the various candidates for the Democratic presidential nomination. We concluded that such a process would be very time-consuming, expensive, and highly vulnerable to error. Consultations with lawyers at the FCC disclosed that the agency does not maintain current records concerning primary qualifications by candidates. Therefore to our knowledge there is no central source of information, but instead each station is left to the difficult task of confirming with every candidate the status of the candidate's qualification and level of campaign activity in any given state. When there are a large number of primary candidates, as is the case in the Democratic Party this year, there is an obvious disincentive to make the requisite investigation.

The attached newspaper report correctly summarizes my personal frustration with this situation. I think it is extremely unfortunate that stations are placed in positions where the law is so unclear and a candidate's appearance must be barred until time, energy, and money are spent to determine what the equal time status of numerous other candidates may be. The net result is to impose a chill on the exercise of journalistic judgment with respect to carrying broadcasts such as the Donahue interview of Jesse Jackson. We definitely wanted to carry the program because of its obvious importance to our audience. (The Schwartzman comments in the attached Post article questioning Channel 9's good faith are false and completely unwarranted.) We expended many hours of time and incurred substantial legal fees before concluding that we could not assume the risks involved.

I understand, incidentally, that because of various FCC interpretations, Jackson can appear on the "Today" show, but not on "Donahue," because "Today" is exempt from the equal time rule as a bona fide news program, but Donahue is not exempt. This just adds to my puzzlement about these laws.

The CHAIRMAN. Mr. Hinshaw.

STATEMENT OF ED HINSHAW, MANAGER OF PUBLIC AFFAIRS, WTMJ, INC., MILWAUKEE, WIS.

Mr. HINSHAW. Mr. Chairman, thank you for the invitation to be here. I am Ed Hinshaw, manager of public affairs for WTMJ, Inc. We operate three stations in Milwaukee, Wis.: WTMJ—TV, WTMJ, and WKTI, an FM station. Part of my responsibility is the preparation and airing of our management's editorials. We are in our 22d year of presenting six editorials or replies each week.

Among the laws and regulations applying to broadcast editorials are the fairness doctrine and the personal attack rule. Our story for you has to do with those requirements.

In the spring of 1981, our 3 stations broadcast 15 editorials critical of the behavior of the mayor of Milwaukee, other government officials and municipal labor union leaders. The mayor, Henry Maier, subseqently filed a complaint with the Federal Communications Commission claiming we had not lived up to the mandates of the fairness doctrine and the personal attack rule.

As you will be reminded later in this presentation, the matter is now under review by the seventh circuit court of appeals in Chicago. Therefore, on the advice of counsel, I will not discuss the merits of the case. I will, however, cover the impact of this matter on our management and staff, on our budget and on the taxpayers of Milwaukee. I will also try to give you a sense of the impact on the FCC and its staff.

The mayor's first complaint, filed in June of 1981, was reviewed by the Commission staff and was found not to be sufficient to request a response from us. Three months later the mayor filed an amended complaint. After reviewing the amended complaint, the Commission staff asked for a response from us. We assembled the necessary records and facts and, in consultation with our Washington counsel, we submitted a reply.

The Commission staff considered the amended complaint, our response, and an additional filing by the mayor. In July 1982, the mayor's complaint was rejected by the staff. A month later, the mayor used his opportunity to apply for a review of the decision by the full Commission. We again consulted with our lawyers and filed a brief in opposition to the application for review.

In February of 1983, the Commission issued a memorandum opinion and order denying the mayor's application for review. In April of 1983, the mayor filed a petition for review of the FCC decision with the seventh circuit court of appeals. Oral arguments were held in November. The case is under advisement.

Our rough estimate of management and staff time spent on this matter is two person months. Our legal counsel costs thus far are more than $17,000. And I might add, that is a substantial figure for us.

The mayor's legal work was done by the city attorney's office of the city of Milwaukee. A look at the documents indicates the amount of time spent on this case by that office is dramatically larger than our own. That is a bill for Milwaukee taxpayers.

It is obvious that the FCC time and expense in this case were substantial. That is a Federal taxpayer bill.

It has been a time-consuming and expensive experience for us. It is the kind of experience which may convince other, smaller, less committed broadcasters to keep their opinions to themselves rather than joining the important public debate.

Most importantly, it would not have happened at all if we had expressed ourselves in print. Newspapers, magazines, and other forms of print journalism have no fairness doctrine and no personal attack rule.

As principles of sound journalism, the doctrine and the rule are welcome. As law and regulation, they are burdensome and restrictive. They are contrary to or in violation of the first amendment to the Constitution of the United States.

The CHAIRMAN. The mayor has asked to file a statement [1] with this committee and, even though we are not subject to the fairness doctrine or the equal time rules, in the spirit of good journalism, I will let him put his statement in the record.

Mr. HINSHAW. In the sense of fairness, we would welcome that, too.

The CHAIRMAN. Mr. Lane.

STATEMENT OF HOMER LANE, PHOENIX, ARIZONA

Mr. LANE. Thank you. Mr. Chairman, distinguished committee members, counsel, staff, guests:

My name is Homer Lane. I served for a number of years as executive vice president and general manager of KOOL Radio-Television, Inc. I am a past president and life member of the Arizona Broadcasters Association and a former member of its Government Affairs Committee. I was employed in broadcasting for a little over 40 years and was with KOOL for something over 31 years. I am now retired.

I speak in support of efforts to repeal the fairness doctrine, section 315 of the act, and other restrictions to broadcasting as broadcasters attempt to fulfill their journalistic functions. It is my opinion that we do a disservice to the American people when we place artificial impediments on the free flow of news between the newsmakers and the public through broadcasting.

The existence of these restrictions provides ready tools for those who would wish to manipulate the news to their own ends. Because broadcasting today is in large part the press in America, it must have the same first amendment protections as do newspapers.

As you know, sir, regularly scheduled news programs and bona fide news events are exempt from the equal time provision of section 315. I would like to cite an example of how the equal time rule, even with these exceptions, can distort the fair reporting of a political campaign.

Shortly after the Democratic and Republican National Conventions that nominated President Ford as the Republican candidate and Gov. Jimmy Carter as the Democratic candidate for President, Governor Carter scheduled an address in Phoenix, Ariz. At the time I felt that our station should carry Mr. Carter's talk, possibly even live.

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[1] See Feb. 8, p. 187.

Our attorney suggested that to do so would trigger section 315. It was my contention that Governor Carter's appearance in Phoenix was a bona fide news event and exempt from the rule. After all, here was a fellow with what seemed to be a 50-50 chance of becoming our next President, a man that Arizonans knew little or nothing about. I felt it was incumbent on us as a responsible news organization to carry his talk so that voters could have some feeling on whether they wanted to vote for him or his opponent.

I asked our lawyer to call the FCC and find out if our carrying his remarks would trigger section 315. Contrary to Mr. Pfeiffer's experience, we did get an opinion from a faceless bureaucrat here in Washington that said section 315 would be triggered and we would have to schedule equal time for the scores of legally qualified candidates who had stated they were running for President, without any regard for the possibility that any of them might indeed become the President of our Nation.

I think the most dangerous thing about this whole incident was the fact that it was someone here in Washington who determined what was and was not news in Phoenix, Ariz.

The election of our government leaders on all levels is the most serious business of our republic. To force our country's broadcasters to artificially distort coverage of an election campaign with restrictions and formulae flies in the face of the first amendment.

Finally, we want to share with you a section 315 experience we had in 1974. At that time it was KOOL-TV's policy to give free 5-minute programs to candidates between the primary and general elections. These special programs were normally scheduled two or three a day in the 4-week period prior to the general elections in November.

In September 1974, Mr Mark Baker, who described himself as campaign manager for Mr. Russ Shaw, an independent write-in candidate for governor in the general election, called and requested equal time on this "Know Your Candidate" free public service series. Mr. Shaw required billings as "Wonderful Russ Shaw."

As he did comply with the laws of Arizona to become a legally qualified candidate for the office of Governor, we complied with the section 315 rules and scheduled "Wonderful Russ Shaw" on one of the 5-minute television programs and also on a 14½ minute free radio interview program we called "Know Your Candidate."

We would like to quote just a small portion of the radio program, the statements of this legally qualified candidate for office. One of the questions:

> The second question is, what is your platform? '
>
> Answer: Well, I have a number of planks to my platform, Joe, which are, to say the least, unique. Freedom for all prisoners, political and otherwise. Free food and free gas. Imagine wheeling your cart down an aisle, putting anything you want into that cart, and getting to the checkout stand and having him say, 'We are really glad you shopped with us', and still getting Green Stamps. '
>
> "Question: OK, the next question, what do you feel the major issues are in the race for Governor? '
>
> Answer: Once I am Governor, there will be no taxes. Now think about that. I am not talking about State sales tax, city sales tax, luxury tax. I am talking about no tax. Income tax, both State and Federal, will be completely eliminated once I am Governor.

I am not talking about some socialistic system. I mean, on election as Governor, to secede from the Union and Arizonans will then be able to collect foreign aid, and it will be totally unnecessary for people to worry about things like taxes.

Question: All right. If elected—what are your qualifications? '

Answer: That is a good question, Joe, and I am glad you asked it. Well, let me assure you who are listening right now, and even those of you who are not listening who are going to be told about this in explicit detail by those of you who are listening, that Wonderful Russ is no stranger to politics, having served as president of the Wickenburg Clown Club from 1956 to 1975. And I was tell-monitor of my third grade class for over 2 months, and even after my term as tell-monitor, the other children used to continually ask my teacher if I could be tell-monitor again.

Question: Okay, Russ, if you were elected, what would be some of the programs you would implement?

Answer: Well, in addition to some of the things I have already covered, for example free food, free gas, free clothing, free housing—I might add, this is just for the people who vote for me. After the complete elimination of all taxes, I plan to blast California off into the ocean and turn Arizona into a seaport community. '

Question: OK. What would be the very first thing you would do if you were elected Governor? '

Answer: Demand a recount.

Thank you, Senator, for your attention.

The CHAIRMAN. Do you mean this fellow was running as a deliberate joke?

Mr. LANE. That was our contention, of course. However, he was a legally qualified candidate.

The CHAIRMAN. I understand that in most States, it is relatively easy to qualify as a local candidate. This is much more true in the West than the East. We have a very democratic, with a small "d", feeling that anybody who wants to run ought to be allowed to run, and anyone can get on the ballot, as you have very clearly evidenced.

Mr. Whitlock.

STATEMENT OF J. T. WHITLOCK, PRESIDENT AND GENERAL MANAGER, LEBANON-SPRINGFIELD BROADCASTING CO., LEBANON, KY.

Mr. WHITLOCK. Thank you, Senator. Mr. Chairman, I feel inadequate to follow an act like that one. I have not been in that particular set of circumstances, but I could certainly concede it could and probably will happen again.

I am J. T. Whitlock, president and general manager of Lebanon-Springfield Broadcasting Co. I have been for 30 years. I am executive director of the Kentucky Broadcasters Association and have been for 16 years.

Where I differ from most of our witnesses here today—and it sort of refutes some of the previous testimony we have heard, I think—is that I am a former newspaperman. That is where I had my journalistic freedom. I could just do about anything I wanted to with a pen or pencil. And they say newspaper people are different from radio people, and I am one and the same. So I think it refutes some of the testimony we have heard about the high ideals of print journalists.

I am also a past board member of the National Association of Broadcasters.

You know, normally an appearance like this does not make me nervous. Today I must confess, after sitting here for about 2½ hours, I am a little nervous. Some of the testimony I hear makes me nervous. Some of the concepts that the people have about what should happen to broadcasters, this excites me greatly.

I think it gives us all, all of us in the broadcast profession, a little room to get nervous. Thank goodness we have got a few friends in Washington, such as your bill addresses.

As the head of a small market AM-FM radio operation and a former newspaper editor in a small town of about 6,000 people, and with 30 years of experience in this field, I can certify the facts I am about to give are true for about 5,000 of my peers in small market broadcasting.

Before giving a couple of actualities, let me tell you a little tale. We have on the books back home: "Bathing in any of the city's mill ponds must be after deep sunset." An obviously useless and outdated ordinance, but no more outdated than our section 315, our fairness doctrine, equal time, and all of that sort of stuff.

My first personal encounter with the political equal time matter arose during a very heated mayor's race a few years back. Candidate A came out and purchased a good block of time. Candidate B came the next day, brought his lawyer along, and informed me they knew their rights and they demand I preempt spots near the local newscasts, even though they were already sold solid to sponsors of long standing. They wanted their candidate to have all of the slots next to the local news.

I showed the local attorney the political broadcast rules. This was not too satisfactory to him. He knew more about the political broadcast rules than I, who had been in the profession for about 25 years at that time. Of course, he made the usual threat to notify the FCC, et cetera, et cetera.

To satisfy this gentleman, the only way I could get it done, I called the NAB legal department, my attorney here in Washington, and we set up a conference call with the attorney. And after about $75 worth of legal time and about $50 or $75 worth of telephone time—it lasted a little better than an hour—we finally convinced the local attorney that I was right all along.

You can see why we steer clear of these fairness things. We know we are right. Of course I know what is in the catechism here. There is not a broadcaster in the room that does not. The regrettable part is that the people who are trying to use it do not know what it is all about, and it is more expensive than a small market radio station can afford to defend ourselves in these things.

I was out some $400 or $500 overall in the harassment, the amount of time lost on the street selling advertising, all to please a candidate that should have been pleased when I said, any amount of time you want to buy, equal time, is available to you. That did not stop him.

Even though I was in complete compliance with all FCC rules, we still had to endure a week of harassment plus a fairly good cash outlay to settle this dispute. * * * Fairness to whom? * * *

Only a couple of years ago a very unhealthy situation arose in Lebanon, it cried for editorials by the station. So due to the extreme delicacy of the situation, we laid back and let the local weekly newspaper do the best job they could, even though, national surveys all point to the fact that the vast majority of the public receive their news and information from the electronic media. * * * Fair to who, certainly not the public. As the operator of a small market broadcast station, I simply could not afford to put my stockholders in the position of having to spend huge sums of money to prove we were right.

Finally on a large market basis, WHAS Inc. a few years ago had to spend about $30,000 to prove they did not owe a $10,000 fine levied on them as the result of a fairness matter. Few, if any small stations could afford this kind of an expenditure to prove they were fair.

In closing, I respectfully submit that if broadcasting had existed when our founding fathers framed the Constitution, broadcasters would have received equal billing with our print counterparts, with full first amendment privileges.

Although obsolete, Lebanon's Millpond Ordinance is doing no harm to anyone. Our present congressionally mandated, section 315, equal time, fairness doctrine rules are just as obsolete as the Millpond law but are doing a terrific injustice to the American public

The CHAIRMAN. Gentlemen, I have no questions. Let me just conclude with this. The problems you have presented here are what I have found with Oregon broadcasters. By and large they are decent people. There are a few rotten apples. Mind you, print may have a fair share of those also.

Do they try to do a fair job covering their local news? Yes, they try to. They bend over backward, if they can.

They are frustrated by the fairness doctrine, frustrated by the equal time doctrine. I am sure they do not spend 10 hours a week thinking about it, but in the back of their minds it nags at them. They fear they may do something wrong and run up against what Mr. Whitlock or any of the others have said. Money and time. In a market of 5,000 or 10,000 people, you cannot afford $200 a week for your local lawyer, let alone what a serious case will cost. So you back off.

I fail to see how the public is served. I have no idea where the votes are in this committee or the Senate. I have not polled the committee. But the evidence is overwhelming that the public is not being well served by these rules.

I am not here arguing the case for you. I am arguing the case for them. They would all be better off if you had the same protection that print has.

That will conclude our hearings today. We will have one more day of hearings next week. We will then see where we go from there. Gentlemen, thank you.

[Whereupon, at 12:10 p.m., the hearing was adjourned.]

FREEDOM OF EXPRESSION ACT OF 1983

WEDNESDAY, FEBRUARY 8, 1984

U.S. Senate,
Committee on Commerce, Science, and Transportation,
Washington, D.C.

The committee met, pursuant to notice, at 9 a.m., in room SR-253, Russell Senate Office Building, Hon. Bob Packwood (chairman of the committee), presiding.

OPENING STATEMENT BY THE CHAIRMAN

The Chairman. The committee will come to order, please.

This is the third of 3 days of hearings on S. 1917, the freedom of expression bill. We have heard from a broad variety of witnesses so far, both pro and con. There appear to be more groups that want to testify for this bill than against, consequently everyone who wanted to testify for it could not be accommodated into the 3-day schedule.

We have tried to make sure that everyone who is in opposition had a chance to testify, so that no one would feel they had been shut out.

I would encourage the witnesses today to put their statements in the record. I have read all of the statements that had submitted by last night. I might say that many of the arguments about scarcity can indeed be made again. They have been made by previous witnesses, and I think they are worth making again. Scarcity is still the issue around which most opponents build their argument. This argument is that the broadcast medium is still very, very scarce, and because it is scarce, regulation is justified and should continue.

With that, we will start the day with Prof. Lucas A. Powe, from the University of Texas.

Good morning, Professor. You were going to share a panel with Bill Van Alstyne, but he could not make it at the last moment.

STATEMENT OF PROF. LUCAS A. POWE, WINDFOHR PROFESSOR OF LAW, THE UNIVERSITY OF TEXAS, AUSTIN

Mr. Powe. I am sorry about that. He is always worth hearing.

The Chairman. He is worth hearing, and he has been very supportive in this area.

Mr. Powe. Let me begin by just talking about four quick cases of the seventies that I think illustrated how the various doctrines of the Commission managed to work.

The first one was the American Security Council Education Foundation's attack on CBS News, where they argued in a very detailed study that CBS News simply did not present, on issues of national security, the idea that we were doing enough.

The Commission said, in effect, that you gave us too big an issue; we cannot handle it. It came to the D.C. Circuit, and in the face of an attack that a network spent 2 years constantly underplaying national security problems, the D.C. Circuit also said: Too big an issue; we cannot do anything about it.

So on the one hand, the Fairness Doctrine or ideas of slanting do not appear to work on the really big issues. Well, how about a small one?

NBC News in 1969 absolutely savaged the private pilots' association. It showed some private pilot, they had him on tape and he said how he had circled Shea Stadium during the World's Series. Then they followed with a wonderfully dignified gray-haired airline pilot, a family man as he was introduced, with years of flying experience, who said the private pilots are the biggest hazard in the air. The commentator suggested twice that that was the case. But it was a three-part program, and when the FCC ruled on it they said: "Oh, well, that was a subissue of the great issue of air traffic safety, too small, you lose."

Well, on a Goldilocks theory, how about one that fits perfectly: Not too big, and not too small. NBC provided that in its Peabody Award-winning documentary, "Pensions: The Broken Promise," which was a wonderful hour of television journalism pointing up the problems in private pension plans. There was a bow to the fact that not all private pension plans were bad, but it was a mere bow and the entire hour was spent basically showing the problems and the need for Federal regulation.

On the same day the program won a Peabody, it also received a sanction from the Broadcast Bureau which found that it violated the Fairness Doctrine.

NBC then went to the full Commission and tried to belittle their own program, saying: "Geez, it was only about some small private pension programs, not a big deal." The Commission, quite properly, did not believe them. The case then went up to the D.C. Circuit, and the problem of the case was: If you found that a fairness violation, I think prime time documentaries were dead, and everyone knew it. Do you show happy pensioners on the Florida beaches on television?

The D.C. Circuit found first that it did not violate the Fairness Doctrine because NBC's characterization had to be believed, and then finally mooted the case because of ERISA.

Three examples, not any of them provided the alleged benefits of the Fairness Doctrine. Well, in one case, the one example where somebody lost a license, Carl McIntyre, a right-wing broadcaster, he had so much controversial programing that he was constantly violating the Fairness Doctrine. The heavy examiner found specifically all sides available in Philadelphia but without McIntyre, his peculiar right-wing viewpoints would not be available. But because he violated the Fairness Doctrine, the Commission took away his license.

Well, in laudatory literature about the Fairness Doctrine we hear about seeing that all viewpoints are available and encouraging controversy; yet, taking McIntyre's license away accomplished exactly the opposite. You wonder how this can happen, and what rationales are applied.

The CHAIRMAN. I might add that I think you are going to get the opposite with the Simon Geller situation if they succeed in taking his license away. You will have no classical music in Glouster, Mass. Instead, you will have one more station that broadcasts weather reports.

Mr. POWE. Yes. I believe that. It is a problem when they take away licenses—although I think much more of a problem when they take away one that is providing controversy the way we would like it.

The typical rationale, as you mentioned in your opening comments, that people hold on, is scarcity—although exactly how scarcity rationalizes taking away a license of somebody that is providing a novel viewpoint has never been clear to me. But the way in the court cases that scarcity is used is nonsense.

The court says broadcasting uses a scarce resource. Well, the idea of a nonscarce resource simply does not exist in economics. So you shift. Justice White says, "Well, more people want a broadcast station than can have one." Well, that is true, but I know a lot of people who would like the Washington Post. I would like to be a millionaire. Again, it is just another way of saying it is a resource, and it flies equally with newspapers.

The CHAIRMAN. We had very good testimony last week—I do not know if you have read the transcript or not—from several people who were brokers of media properties. I posed the question to one of them of what it would cost to start or to buy a radio station, A television station, or a daily newspaper in a small, medium, or large market. He said, he could answer that question. But, he said, you have to understand that as far as daily newspapers are concerned, not counting the Washington Times because he was not sure what was going to happen, and not counting U.S.A. Today as a local newspaper, that apart from Newsday and the Gannet publication in Coco Beach, and one unusual situation in Tennessee, no daily newspaper has successfully started in a major market in this country since the end of World War II. It just does not happen. That is scarcity.

Mr. POWE. That is what I believe. You have seen, with the folding of the Star, and the folding of a Philadelphia paper, a Memphis paper, that daily newspapers are much more scarce and much more likely to fold than broadcasters.

The CHAIRMAN. And much more expensive, interestingly enough.

Mr. POWE. Decidedly, to start up. If you have got enough money, you can buy a daily newspaper, but you can get your broadcast properties cheaper.

I think the use of scarcity is designed to find some way, since it cannot be a comparison with the print media, to try and find something that is scarce. It has just never seemed to me to work. Somebody says a church flyer is a newspaper, count that; or all printing presses, to get the number.

The CHAIRMAN. As you point out, CB is broadcasting. You do not even have to apply for a license anymore.

Mr. POWE. Yes. I have never seen any of the scarcity advocates take account of CB, and I think the simple reason is that they can not explain it. But the other thing is, CB really took off, I think, around 1977, 1978, and to the best of my knowledge—at least in the legal literature—there has not been a good word said for the scarcity rationale since 1975. So it is hardly surprising that anybody believes in scarcity.

That is why I really think that, while people may say scarcity largely because the Supreme Court has put its imprimatur on that, the real rationale that regulates broadcasting is the power theory, which can be taken from Pacifica where radio was called "uniquely pervasive," an intruder that can get at unsupervised kids.

Well, leaving aside the unsupervised kids, because I do not really think we would like to have Time Mag censored just because it can come in the mail before or a parent gets home, the intruder and the uniquely pervasive, I have never understood how a television set got in the home. You see a Government agent stealthfully putting it in the living room, and then an FBI man standing there saying "turn it on, turn it on"?

The idea of television as an intruder is preposterous. We pay a lot of money for sets, and we turn them on consciously. The uniquely pervasive makes more sense to me as an idea, but I do not know what it means.

It is a wonderful, charming phrase where people throw it about because it does not have to be defined. I think it does go back to power. But the idea that Red Lion Broadcasting in a small Pennsylvania community is powerful, but the Miami Herald is not, or the Washington Post is not, is preposterous.

The CHAIRMAN. I commented at the last hearing that I do not even have cable. I can get four VHF channels, the three affiliates plus an independent, I can get two more VHF channels from Baltimore, and I can get channel 20 and 26, which are UHF channels. I have never yet been fortunate enough to live in an area that has cable. Some day I probably will.

I do not know how you can that any one of those television stations, let alone the dozens of radio stations, are more pervasive than the Washington Post.

Those who talk about scarcity keep talking about the national networks. They keep talking about Dan Rather and Tom Brokaw as being pervasive. Without arguing that one way or the other, I do not even think they are that pervasive.

When you start consider the different local news shows that appear on the television stations several times a day, all of them with slightly different viewpoints and slightly different concepts of programing, and all of the radio news that is available, to argue that any one of those is pervasive but that the Washington Post is not pervasive belies a use of language that I simply cannot grasp.

Mr. POWE. I agree. I think the use is largely based on Marshall McLuhan: The medium is the message; and there is some feeling that television changes us in ways that we do not quite understand and we really do not know what to do about it.

There may well be some truth in that. Certainly the printing press changed Western civilization in ways that we would not have anticipated, and that is in large part why it was censored so vigorously when it came in. But I would have thought that, at least at this point in our history, that the idea that we are afraid of something, although we are not quite sure why, was not acceptable. It is just a claim that we have got to preserve whatever status quo we have because we do not know any better. I think that is at war with the idea of a free and open society.

If I could just say a word or two about the chilling effect, because I think this is also an important argument that is involved, again the Supreme Court seems to be riding off on a ludicrous plane. The have told us that broadcasters will not be chilled by the FCC's doctrine. These are a real hardy breed.

Newspaper people just shiver and quake, and if you give a candidate a right to reply, why the newspaper will just go print comic strips. It is as if they neither read newspapers nor watch television when they come up with these statements about our society.

I have heard broadcasters say that the Fairness Doctrine operates as a chill on them. I think, looking at them, that there is no doubt that broadcasting is not as vigorous as the print media. I furthermore think that as I have listened to this debate over the last decade involving the FCC's doctrines, both as a participant and as a listener, you see some of the rationales come through.

Last fall, FCC Chairman Mark Fowler came on Cable News Network's Crossfire program, and it marked the only time that I have seen Tom Braden and Pat Buchannan be as one. Both of them were just as frightened as could be at the idea of free television, not a censored television, because both felt that their viewpoints might be the ones slighted, and that they were willing to see it censored, or held back, just to avoid that.

The view that comes through is that we do not trust broadcasters. We do not know what they are going to do. We do not know if we will get the type of coverage we want. And if we do not, then, we have got to be able to threaten them to coerce them back into being tamed beasties.

These arguments both from the right and the left reflect a profound distrust of broadcasting, and a real desire to keep it on a short leash. It is as if the proponents of these doctrines know that they chill, and support the doctrines precisely because they do chill broadcasters. It limits the broadcasters' ability to get out of hand.

I think the chilling effect ties right back in with my idea that scarcity is the facial reason for regulating, the real reason we regulate broadcasters is a fear.

The CHAIRMAN. You may be right I have been intrigued with the witnesses in opposition. They generally represent very liberal or very conservative groups. These groups are hand in hand in opposition to repeal of the content doctrines.

We had a representative from the Eagle Forum, which is Phyllis Schafly's group, testifying in opposition, and a representative from Ralph Nader's group testifying in opposition on the same day. Whereas, what I would call large mainstream groups, the American Society of Newspaper Editors, the Newspaper Publishers, Sigma Delta Chi, the journalism deans and teachers, all these associations favor repeal.

I think deep down very liberal and very conservative groups think it is the obligation of the media to help them further their social objectives. When they are out of power, they will risk relying on some sort of fairness doctrine to get their view across. When they are in power, they are going to try to direct the media to achieve their efforts, which is exactly what the first amendment was designed to protect against.

Mr. POWE. I think that is true, although on a slight modification. I have had the view—I have listened, because most of my friends come out of the liberal community, to their views on it. As I have tried to explain to them why these doctrines do not work to accomplish all the good objectives my friends tell me, if we could get the perfect commissioner and clone him several times to give him a perfect majority, then the doctrines would work. But it is a world that never has, and I do not think ever will, exist.

The CHAIRMAN. The last time I heard that theory seriously propounded was by Plato.

Mr. POWE. Well, if you can pick the right philosopher kings, maybe you should go to his Republic. I would still prefer to vote for my representatives.

I just do not even think that the right and the left understand well; if they like the doctrines because they chill I can understand that; if they like the doctrines because they think properly applied they will give them more coverage, they are wrong. I think the Fairness Doctrine and other kinds of doctrines operate mainly to reinforce mainstream viewpoints.

The CHAIRMAN. I would put it this way. If other Senators or I go home, by and large we are newsworthy, and we can come within the news exemptions. Therefore, we can get some publicity that one, or two, or three, or four people thinking of challenging us cannot get from a news standpoint. Although the FCC has changed the rules recently local radio or television stations have been reluctant—especially in primaries—to have debates with five or six or seven candidates. They cannot say who they think the principal challenger to Senator Packwood is and just have a debate with just two candidates.

That is the kind of judgment newspapers make when they invite candidates to appear before their editorial boards and ask these candidates to answer questions. They do not invite everybody in; they invite in people whom in their judgment are the likely candidates or the prospective opponents. But radio and television can't do this.

The worst example I have seen recently was in the State of Washington. Washington has a bedsheet primary. Although you file as a Republican or a Democrat, the top Democrat and the top Republican runoff in the general election. When Senator Jackson died and Senator Evans was appointed, 31 people filed. There were 18 Republicans and 13 Democrats, or vice versa.

Do you think any station in its right mind is going to have a debate with 31 candidates?

Mr. POWE. I have unfortunately seen one of those.

What you wonder is, since I showed one person arguably in his right mind watched for a bit, I just cannot imagine other people watching. Who cares? Newspapers in their synthesis does it a lot better. I fully agree.

I think that the content doctrines of the FCC are just fundamentally inconsistent with the idea out of *New York Times* v. *Sullivan* that we have a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.

It seems to me that the Times speaks to what we want to be, and the content doctrines simply do not address those issues and inhibit us in achieving those goals. I do not know what would be the outcome if your bill would be adopted as law. It seems to me that predicting the future is impossible.

It could be that broadcasters will still remain timid beast searching after commercialism and that, but if the bill is enacted it will place broadcasters where the first amendment would have them where they would have the opportunity to fully participate in our national dialog, and it seems to me very few bills could do so much in promise.

The **CHAIRMAN**. My hunch is we will get a great deal of diversity. Some broadcasters will be a little bit timid and they will not want to advance too far, but others will. Some may have the equivalent of letters to the editor, some will not. You should get quite a wide spectrum of diversity and opinion on all sides.

Mr. **POWE**. Well, I would hope so, because it does seem to me that at least Cable News Network is providing more diversity than we had seen previously, and maybe cable will wear out the FCC's regulations. But I would hope that we would see the diversity that we so clearly see in the print media.

The **CHAIRMAN**. Larry, do you have any questions?

Senator **PRESSLER**. Well, not really. I just wanted to make an observation. I do not know if this is related to this bill, but I wanted to ask you what impact it might have.

We talk about a lot of diversity, but really there is a concentration of ownership and a concentration of source. For example, in foreign affairs reporting there are really only a few news organizations who can afford to do original foreign affairs reporting. Now there are several people who comment on it, several people who take the stuff off the AP or UPI wire, or Reuters, or wherever it comes from, and use it. But there is a great concentration of source, for example, out of Washington, D.C. Everyone takes what is in the Post and the Times, and maybe one or two of the networks and repeats it. That is their lead for the day if something is on the front page of the Washington Post.

So you have lots of voices, but they are all repeating the same thing. I am just taking foreign affairs as an example. Almost all the foreign affairs stories come from two or three sources. You may have 500 diverse outlets, but they all repeat the same thing.

What impact would this bill have on that, if any?

Mr. **POWE**. I do not believe it would have any impact. It would be nice if somehow the bill would create the desire of those organizations with sufficient money to go out into corners of the world and learn something about them before they blaze onto our front pages, but I cannot believe that the bill would have any effect whatsoever on the problem.

Senator **PRESSLER**. With deregulation, and this bill would be another step in that direction, a lot of broadcasters and news organizations seem to be spending less and less on news; it is sort of the rip-and-read concept.

It is true that there might be 20 radio stations in the town, but they all rip the same AP wire and read it for 3 minutes between records. There may be 20 different voices, but they are all reading the same thing. There is very little money being spent on original news reporting or original research or community events.

It would seem to me that this bill would involve further deregulation, would it not?

Mr. POWE. Since it is taking away regulation, I will have to answer that yes, but I would like to give a more complete answer. I really do think I disagree with the premise of your question.

In the 1960's or the 1970's prior to any ideas of deregulation, most radio stations gave you rip-and-read news. That is all the FCC required. That is all you really can require, because you cannot tell somebody: Go off and do something that you do not want to do; they will just do it badly. No one, I think, benefits from getting rip-and-read news.

Now with deregulation, although it was coming prior to that, you have got stations, all-news stations, where someone that wishes to get more of what is happening is capable of doing it. Many of the FCC's doctrines have been premised on the idea that we will force the unwilling listener to learn something that he does not want.

As a teacher for a number of years, I have learned that you cannot force somebody who does not want to learn to assimilate knowledge. It just cannot happen. I think that the best one can hope for is to provide an environment where information is available for people who wish to know, and to attempt to encourage more people to know. I think that this bill, by opening up the broadcast media for more controversy provides the opportunity to create a much more informed citizenry.

Senator PRESSLER. Thank you.

The CHAIRMAN. Professor, thank you. I have no more questions. I appreciate your taking the time to appear. You were a good leadoff witness.

Mr. POWE. It was my pleasure. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Next we will have a panel of Mr. George Shapiro, Mr. Trygve Myhren, and Mr. Barry Wilson.

Again, gentlemen, let me indicate that your statements will be placed in the record in their entirety. Do you want to start with Mr. Shapiro?

STATEMENTS OF GEORGE SHAPIRO, COUNSEL, WASHINGTON, D.C.; TRYGVE E. MYHREN, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, AMERICAN TELEVISION & COMMUNICATIONS CORP., ENGLEWOOD, COLO.; AND BARRY WILSON, VICE PRESIDENT, OPERATIONS, UNITED CABLE TELEVISION CORP., DENVER, COLO.

Mr. SHAPIRO. Thank you, Senator.

The CHAIRMAN. I found your book quite good.

Mr. SHAPIRO. My name is George Shapiro. I am a member of the law firm of Arent, Fox, Kintner, Plotkin & Kahn, and I completely support the findings set forth in S. 1917. No one would contest that freedom of speech is an essential hallmark of a democratic society.

Although the Supreme Court has upheld, as applied to broadcasters, both the Fairness Doctrine and the reasonable access requirement of section 312 of the Communications Act, the Court's decisions were based explicitly on the scarcity of the radio frequency spectrum, which clearly does not apply to cable television.

As a result, even if the spectrum scarcity rationale is valid—and we have heard some discussion on that this morning there would still be serious constitutional questions regarding the validity of the requirements of the fairness doctrine and sections 312 and 315 at least if applied to cable television.

The Supreme Court held in the *Miami Herald Publishing Co.* v. *Tornillo* that right of access doctrines similar to those obligations established in the Fairness Doctrine and sections 312 and 315 are unconstitutional when imposed on the print media. Such an access obligation calls for Government intrusion over the exercise of editorial discretion which conflicts with the first amendment.

Cable operators originate programing of their own, and they choose from a large number of available services in order to offer a mix of channels which appeals to their subscribers. Both the FCC and the courts have recognized that cable systems also exercise a significant amount of editorial choice and discretion.

Even if the requirements of the Fairness Doctrine and sections 312 and 315 are not flatly unconstitutional as applied to cable television, the burden is on the Government to demonstrate that there is a compelling interest in applying them to cable television.

A review of the administrative and legislative application of the Fairness Doctrine and sections 312 and 315 of the Communications Act to cable television shows that very little reasoned decisionmaking has occurred to supply either the requisite compelling or substantial Government interest. Even if some justification had been supplied, the impact of these regulations on cable systems is unconstitutionally intrusive.

If the requirements of the Fairness Doctrine and section 312 and 315 are applied to each separate cable channel, these requirements would prevent cable systems from taking full advantage of their multichannel capability.

The CHAIRMAN. Could I interrupt? I assume that if you apply it to every cable channel, every channel has to comply with the doctrine. As an operator, you cannot have one religious channel, one classical channel, and one for children. Everyone of them has to comply with the doctrine.

Mr. SHAPIRO. Well, there are two approaches, Senator. Either a channel-by-channel application; or it is possible you could take an overall approach to the entire service offering by the cable system. I think the FCC has been taking primarily the channel-by-channel approach. I think both of them raise problems, although the nature of the problems are a little different.

If a channel-by-channel approach is used, it requires cable systems to carry on each nonbroadcast channel political advertising and public interest programing. This would prevent cable operators from meeting consumer demand for entertainment and informational programing on channels that contain no advertisements or editorializing or for other types of specialized programing.

This requirement would also prevent cable operators from offering programing to serve specific needs and interests of particular groups on particular channels, one of the principal benefits that the multichannel cable systems are able to provide.

An unacceptable intrusion into the first amendment rights of cable operators would also occur if the requirements of the Fairness Doctrine and sections 312 and 315 are applied on an overall basis to the cable systems' service offering rather than on a channel-by-channel basis.

Cable operators would be forced by these requirements into an endless exercise of comparing the programing on all channels in order to determine that a proper balance has been struck, as defined by governmental officials. Political appearances or editorials on one channel would have to be matched on other channels and questions of timing and channel positioning would be virtually insurmountable.

In order to comply with these requirements, a cable operator would have to undertake extensive monitoring of all nonbroadcast channels and to maintain extensive logs in order to insure that the system did not violate the requirements and to be able to defend himself against a charge of violations. This massive monitoring and logging requirement would arguably chill the exercise of the first amendment, especially in cable.

My time has expired.

The CHAIRMAN. Why don't you go ahead and wrap up, Mr. Shapiro.

Mr. SHAPIRO. The loss of programing that this chill would cause must be measured against the fact that there is absolutely no need to apply such regulation to cable television. Cable operators provide diversified programing in response to market forces and by virtue of the number of channels available for different views. The diversity of the entire service offering also insures that there is a fair opportunity for presentation of different views.

These considerations underscore the difference between a broadcast station, which must be all things to all people on one channel, and the cable system which offers diverse services to different audiences on numerous channels.

For these reasons, I support the Freedom of Expression Act of 1983 which repeals these requirements and relieves cable operators and broadcasters of the need to institute expensive constitutional litigation in order to indicate their first amendment rights.

[The statement follows:]

STATEMENT OF GEORGE H. SHAPIRO, COUNSEL, ARENT, FOX, KINTNER, PLOTKIN & KAHN

My name is George H. Shapiro. I am a member of the law firm of Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., and I have specialized in the practice of communications law with that firm since 1963. In that capacity, I have represented cable television companies, broadcasters, common carriers and others before the Federal Communications Commission ("FCC") and the courts. I am a co-author of the recently published book "CableSpeech: The Case for First Amendment Protection," which was prepared as a study for Time, Incorporated, and I have also published articles on communications law, participated in and chaired educational seminars on cable television, and appeared on panels at meetings of state, regional and national cable television associations. In the course of my work, I have frequently dealt with questions relating to the constitutional protection accorded by the First Amendment to the electronic media and, particularly, to cable television.

At the outset, I completely support the findings set forth in Senate Bill S. 1917. No one would contest that freedom of speech is an essential hallmark of our democratic society and, in light of the number of outlets for electronic communications, it is difficult to perceive that there is any media scarcity which in any manner justifies government control of the content of speech. Although the Supreme Court has upheld as applied to broadcasters both the Fairness Doctrine which is recognized in Section 315 of the Communications Act.[1] and the "reasonable access" requirement of Section 312 of the Communications Act, the Court's decisions were based explicitly on the scarcity rationale. [2] Even if there were some validity to the scarcity rationale as applied to broadcasting, and there is a substantial basis for questioning its continuing validity,[3] it clearly does not apply to cable television. As a result, there are serious constitutional questions regarding the validity of the requirements of the Fairness Doctrine and Sections 312 and 315 at least if applied to cable television.

The requirements of the Fairness Doctrine and Section 315 equal time obligation were first imposed on cable television by the FCC in 1969.[4] The FCC has recently commenced a rule making proceeding, however, to examine the Fairness Doctrine and other requirements based on Section 315 as they are applied to cable television. One reason for this examination is the FCC's recognition that the scarcity rationale is not applicable to cable television and that accordingly there is serious question whether the Fairness Doctrine as applied to cable television would withstand constitutional scrutiny.[5]

Although the FCC at one point appeared to interpret Section 312 to apply reasonable access requirements to cable television, there is no reported decision in which the FCC has done so, and the FCC's Cable Television Bureau in 1981 concluded that without further legislation or FCC rule making Section 312 or rules based on it could probably not be enforced against cable systems.[6]

Regardless of the statutory or regulatory basis for the Fairness Doctrine, equal time or reasonable access obligations, however, they represent an unconstitutional intrusion into the First Amendment rights of cable operators. The Supreme Court held in *Miami Herald Publishing Co.* v. *Tornillo*[7] that right of access doctrines similar to those obligations established in the Fairness Doctrine and Sections 312 and 315 of the Communications Act are unconstitutional when imposed upon the print media. In that decision, the Court held that the First Amendment precludes legislative attempts to establish a right of access to the print media because such an access obligation calls for government intrusion over the exercise of editorial discretion, which conflicts with the First Amendment. Cable systems perform many of the editorial functions traditionally associated with newspapers. Cable operators originate programming of their own, and they choose from a large number of available services in order to offer a mix of channels which appeals to their subscribers. In fact both the FCC and courts have recognized that cable systems exercise a significant amount of editorial choice and discretion.[8] As a result, statutes or rules which apply requirements such as the Fairness Doctrine or those contained in sections 312 and 315 cannot be constitutionally applied to cable television systems for the same reason that such regulation cannot be applied to the printed press.

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[1] The FCC developed the Fairness Doctrine pursuant to the public interest standard of the Communications Act. In 1959 Congress amended Section 315 and recognized the Fairness Doctrine, an action which the FCC has recently characterized as "ratifying" the Fairness Doctrine rather than explicitly codifying it. "Notice of Proposed Rule Making in MM Docket No. 83-331," FCC 83-130, 48 Fed. Reg. 26472 (1983) at ¶ 44 & n.64. As a result it is necessary in S. 1917 both to repeal Section 315 and provide clarifying language in Section 326 to ensure that the Constitutional rights of the electronic media are not infringed by an expansive reading of the public interest standard as justification for Fairness Doctrine obligations.

[2] While the constitutionality of the "equal time" provisions of Section 315 have not been explicitly upheld by the Court, it has implicitly assumed the validity of this statutory requirement in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); and *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

[3] For a discussion of the scarcity rationale, see G. Shapiro, P. Kurland & J. Mercurio, "Cable-Speech: The Case for First Amendment Protection," 56–63 (1983) [hereinafter cited as "Cable-Speech."].

[4] First Report and Order in Docket No. 18397, 20 F.C.C. 2d 201 (1969). These obligations were imposed on cable systems, prior to the time Section 315 was first amended to explicitly include cable systems, in conjunction with a rule requiring certain cable systems to originate programming. The origination rule was subsequently rescinded by the FCC, but the equal time and fairness obligations were retained. Report and Order in Docket No. 19988, 49 F.C.C. 2d 1090 (1974). The FCC's Cable Television Bureau has recently questioned whether the FCC has statutory authority to apply the Fairness Doctrine to cable television. Cable Television Bur., FCC, "Cable Television and the Political Broadcasting Laws: the 1980 Election Experience and Proposals for Change" 21 (1981) [hereinafter "1981 Cable Bureau Report"].

[5] Notice of Proposed Rulemaking in MM Docket No. 83-331, 48 Fed. Reg. 26472 (1983).

[6] 1981 Cable Bureau Report, *supra* note 4, at 24–25.

[7] 418 U.S. 241 (1974).

Even if the requirements of the Fairness Doctrine and Sections 312 and 315 are not flatly unconstitutional as applied to cable television, the government must demonstrate that there is a compelling interest in applying them in this manner. This is true because a starting point for First Amendment analysis is that communication is presumptively protected from government interference. In First Amendment cases, the Court has established a balancing test in which the intrusion on First Amendment rights is balanced against any governmental interest that the regulation is asserted to further. When the intrusion on First Amendment rights is content-based, such as is the case with the Fairness Doctrine, and Sections 313 and 315, the government must demonstrate that the regulation is a "precisely drawn means of serving a compelling state interest." [9] While some argue, mistakenly, I believe, that the Fairness Doctrine and Sections 312 and 315 are content neutral, even "content neutral" regulation of speech can have a significant effect on First Amendment freedoms. The Court held in *United States* v. *O'Brien*,[10] that in order to justify even incidental and content neutral infringements of speech the government must establish that its regulation furthers an important or substantial governmental interest unrelated to the suppression of free expression and that the restriction on speech is no greater than is essential to further that interest.

A review of the administrative and legislative application of the Fairness Doctrine and Sections 312 and 315 of the Communications Act to cable television shows that very little reasoned decisionmaking has occurred to supply either the requisite compelling or substantial government interest justifying application of those obligations to cable television.[11] The FCC itself has acknowledged that it only "summarily" dealt with the application of equal time and fairness obligations to cable television,[12] and the FCC's Cable Television Bureau has stated that "there has been little detailed consideration of these laws, regulations, and policies as they have been applied to cable television." [13] Nor does the legislative history of Sections 312 and 315 provide a basis for arguing that these statutory provisions if applied to cable television are supported by a substantial governmental interest. In the Federal Election Campaign Act of 1971 Congress promulgated campaign expenditure limits for all communications media in amendments which also applied the equal time provisions of Section 315 to cable systems. The legislative history of these amendments contains no discusson of any circumstances which would warrent extending the equal time requirement to cable television. Although the reasonable access provisions of Section 312, which also were enacted in the 1971 amendments, at first appeared to apply to cable television, the 1974 Amendments to the Federal Election Campaign Act seem to have eliminated the application of Section 312 to cable. Neither in 1971 nor in 1974 was there any Congressional discussion of the effect of or rationale for applying Section 312 to cable television. Thus, these regulations are unconstitutional as applied to cable simply because no justification has ever been developed for them.

Even if some justification for application to cable television of these statutes and the FCC's rules based on them had been supplied, the impact of these requirements on cable systems is unconstitutionally instrusive on the editorial discretion of cable operators. In fact, the impact of these requirements is considerably more intrusive on cable systems than on broadcasting, because of the multichannel capability of cable television.

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[8] The FCC has explicitly rejected arguments that cable operators exercise little editorial choice. "Nondiscrimination-CATV Employment Practices," 69 F.C.C. 2d 1324, 1333 (1978). The Court in *FCC* v. *Midwest Video Corporation*, 440 U.S. 689 (1979) [*"Midwest Video II"*] recognized the cable system's editorial discretion not only in the programming it presents on each channel, but also in "the total service offering to be extended to subscribers." *Id.* at 708 n.17. The Court stated that "[c]able operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include." *Id.* at 707. For a more detailed discussion of the editorial discretion exercised by cable operations, see *CableSpeech, supra* note 3, at 80–89.

[9] *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 540 (1980). The court has recently stated that it "has sustained content-based restrictions only in the most extraordinary circumstances." *Bolger* v. *Youngs Drug Products Corp.*, 103 S.Ct. 2875 (1983).

[10] 391 U.S. 367 (1968).

[11] *See CableSpeech, supra* note 3, 65–70.

[12] "Memorandum Opinon and Order in Docket No. 19988," 53 F.C.C.2d 1104, 1105 (1975).

[13] 1981 Cable Bureau Report, *supra* note 4, at 2.

If the requirements of the Fairness Doctrine and Section 312 and 315 are applied to each separate cable channel, as the FCC originally contemplated when it applied the Fairness Doctrine to cable, these requirements would prevent cable systems from taking full advantage of their multichannel capability. Cable systems would be required to carry on each non-broadcasting channel political advertising and public interest programming. This would prevent cable operators from meeting consumer demand for entertainment and informational programming on channels which contain no advertisements or editorializing, or for other types of specialized programming. This requirement would also prevent cable operators from offering programming for specific audience and constituencies on distinct channels. In effect, this requirement would impose an ideological balance on each cable channel which would prevent cable television from tailoring its programming to the specific needs and interests of particular groups.

Another problem with applying content obligations to single cable channels is that they would interfere with channels used for transmission of textual services such as possible future home-delivery of newspapers by facsimile or other means. Such a result seems directly prohibited by the Court's ruling in *Miami Herald Co.* v. *Tornillo* because it would impose government content control over newspaper material simply because it is being offered by a cable system. To exclude "electronic print" channels from regulation while regulating other channels on cable systems, however, would be an arbitrary, and thus a constitutionally unjustified, classification.

An unacceptable intrusion into the First Amendment rights of cable operators would also occur if the requirements of the Fairness Doctrine and Sections 312 and 315 are applied on an overall basis to the cable systems' service offering rather than on a channel by channel basis. Cable operators would be forced by these requirements into an endless exercise of comparing the programing on all channels in order to determine that a proper "balance" has been struck, as defined by governmental officials. Political appearances or editorials on one channel would have to be matched on other channels and questions of timing and channel positioning would be virtually insurmountable.

Regardless of whether the Fairness Doctrine and Sections 312 and 315 are applied to cable systems on an individual channel or overall system basis, however, in order to comply with such requirements, a cable operator would have to undertake extensive monitoring of all non-broadcast channels and to maintain extensive logs in order to ensure that the system did not violate the requirements and to be able to defend himself against a charge that he had violated those provisions.[14] The need to establish monitoring and logging procedures would impose a straggering cost and incredible administrative difficulties on cable operators because of the number of channels available on modern cable systems. Whereas most broadcasters retain such records relating to their single broadcast channel, cable operators would be forced to screen and monitor all their numerous channels, which would inevitable lead cable system operators to avoid topics or editorials which would run the risk of allegations that the cable system had violated the rules. Thus, the requirements imposed by Sections 312 and 315 of the Communications Act pose the risk of a far greater chill on the editorial discretion of cable operators than for other communications media. The result of this chill would inevitably be that cable operators would present less controversial issue and political programming than would be the case in the absence of these restrictions, thereby limiting the availability of such programming to the public.

The unacceptably high cost in terms of First Amendment freedoms which is presented by the application of the Fairness Doctrine and Sections 312 and 315 to cable systems must be measured against the fact that there is absolutely no need to apply such regulation to cable television. Cable operators provide diversified programming in response to market forces and by virtue of the number of channels available for different views. The diversity of the entire service offering also ensures that there is a fair opportunity for presentation of different views.[15] Cable systems can be expected to market their ability to present different viewpoints so that advertisers, politicians and advocates of particular viewpoints can reach the most receptive audiences—just as partisan newspapers at the time of the adoption of the First Amendment reached eager "subscribers." All of these considerations underscore the difference between a broadcast station, which must be all things to all people on one channel, and the cable system, which offers diverse services to different audiences on numerous channels.

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[14] *See Brandywine-Main Line Radio, Inc.* v. *FCC*, 473 F.2d 16, 32, 49–50 (D.C. Cir. 1972), where the court referred to the fact that a broadcast licensee had established no screening or record maintenance program as evidence that the licensee did not intend to comply with the personal attack component of the Fairness Doctrine.

[15] Cable systems operate in a diverse and expanding communications marketplace from which consumers can choose numerous alternate sources of news and entertainment.

In sum, government bears a heavy burden to show that any substantial government interest justifies the requirements of the Fariness Doctrine and Sections 312 and 315 as applied to cable television. That interest has never been shown. The traditional justification for imposing such controls on the broadcast media has been the scarcity rationale which simply cannot be applied to multiple-channel cable systems. The Fairness Doctrine and the legislative requirements of Sections 312 and 315 bring with them a heavy cost in government intrusion into editorial decisionmaking and chill on the editorial discretion of cable operators. For these reasons I support the Freedom of Expression Act of 1983, which repeals these requirements and relieves cable operators and broadcasters of the need to institute expensive constitutional litigation in order to indicate their First Amendment rights.

The CHAIRMAN. For the life of me, there is no way you can apply the scarcity argument to cable. It is a bootstrap argument, if it exists at all. First the cities license it, and then they say it is scarce. Indeed, you could have five cable companies each with 30 channels apiece, assuming that the marketplace would take care of them and they wanted to try to compete. But on the one hand, to impose a government license and say, therefore you are scarce and now we are going to impose doctrines on you because you are scarce, when we have created the scarcity, simply carries it beyond any rational discussion in my judgment.

Mr. Myhren?

Mr. MYHREN. Thank you. Good morning, Mr. Chairman, and members of the committee.

My name is Trygve Myhren. I am chairman and CEO of American Television and Communications Corp., ATC, a subsidiary of Time, Inc. We operate more than 125 cable systems serving over 2 million homes.

The issues we are discussing today, Mr. Chairman, are not only very important; we believe they are of extreme urgency. The fairness and political rules are part of a much broader problem. Somehow we have gotten off the track of strong first amendment values. We have lost sight of the central role which free speech plays in a democratic society.

Attempts to limit speech or to proscribe what a particular speaker may say have become routine. Municipalities all around the country are attempting to trade their control over cable rights of way for authority to control cable operators' speech. Efforts to prevent certain types of speech are commonplace and they are well documented. However, I am particularly concerned about how often mayors and city councils tell us what programs to put on our systems.

There appears to be very little sensitivity to the overall impact such activity has on the free flow of information. Our resolve to resist first amendment restrictions is unwaivering. As you know, last year we funded an analysis of the constitutional rights of cable operators conducted by an independent group of constitutional scholars. The study was recently published as a book entitled "Cable Speech: The Case For First Amendment Protection."

S. 1917 is another important step in this process, and would put us back on the track of free and open public debate on controversial and political issues. It also serves notice that our goal is not to preserve the status quo. Rather, we must reclaim the first amendment rights which have been lost.

We appreciate your personal commitment to strengthen support within Congress and the public at large for a reaffirmation of fundamental first amendment rights.

Analysis of S. 1917 must begin with a recognition that cable television systems have grown from largely passive funnels for broadcast services to full-fledged first amendment speakers. In addition to offering broadcast services, we choose from approximately 40 cable program services which offer movies, sports, special events, news, religious, weather, health, minority, and public affairs programing.

More importantly, program origination has become a fundamental element of the cable business. We have become electronic publishers. Cable operators are generating programs geared to issues of particular local interest ranging from live city council meetings to local theatrical and musical performances.

Our American Viewpoint series, consisting of editorials on important local, national, and international issues, is now being seen throughout the United States on ATC systems. Cable operators clearly exercise editorial functions very much like a newspaper editor. By their very nature, the fairness and political rules restrain the manner in which the media communicate. The rules impede discussion in the very areas in which the public's need to be fully informed is most critical.

The media should have full rein to take the gloves off and pursue these issues in a manner that will spark public concern and debate. Yet, surprisingly the opposite is true today. The media is forced to tiptoe around controversial and political issues, constantly in fear of running afoul of Federal regulation. These concerns are not theoretical; they are played out daily in our cable systems.

Basically there are two reasons why the rules ultimately limit discussion of controversial and public and political issues.

First, the rules are very costly and administratively difficult to deal with. Second, they intrude very deeply into the cable operators' ability to speak freely. The cost and administrative difficulties are really enormous. The precise recordkeeping, the prescreening, and tape retention costs are significant enough on a single broadcast channel.

As you were just discussing, the programs are increased many times over for the cable operators. Even the small cable systems have 12 channels, and the capacity to generate 288 hours of programing a day. Assuming that an employee could screen 8 hours of programing in a normal workday—an additional 36 employees would be necessary in a small system like this to fully comply with the rules.

When you recognize that most 12-channel systems have only 15 employees to start with, and you are going to add 36, this causes some difficulty. It would add almost three-quarters of a million dollars in salaries, and a system that is turning a reasonable but not excessive rate of return would all of a sudden go from the black to the red.

A Rand study of the Fairness Doctrine complaint against KREM-TV in Spokane, Wash., is also illuminating. Resolution of the case took 21 months and cost $20,000 in legal fees. More importantly, however, a total of 480 man-hours of executive and supervisory time was required. One cannot shrug off the chilling effect such a process has.

Ideally, the topics addressed in our American Viewpoint series should be selected and presented solely on the basis of our editorial judgment considering the concerns and interests of our subscribers. However, the costs of the rules force us to also consider whether any particular topic would trigger the Fairness Doctrine.

The rules are so ambiguous that the type of administrative nightmare that I described is a very real possibility. For a cable operator, this situation very definitely affects our program choice.

I have just a bit more to go here. Is that all right?

The **Chairman**. Go ahead.

Mr. **Myhren**. In addition to the cost and administrative difficulties, one should not discount the personal dynamics in assessing the impact of the rules. We find it abhorrent that others can control what we say and when we say it. I think this is a natural reaction. It is very much like the reaction you or I would have if someone attempted to tell us what to say.

The reaction really is no different just because we are a company. As a result, we try to limit the number of instances in which the rules are going to apply. By doing so, we limit the number of instances in which external parties are permitted to tell us how we speak. This reaction I believe is absolutely ingrained in the American spirit. Americans do not tolerate being told what to say.

The impact on the public debate is unfortunate. The rules inevitably limit public discussion on controversial and political issues. We do not see any counterbalancing rationale for the rules. In the broadcast context, the rules have traditionally been justified based on the scarcity of spectrum and the perceived need to insure diversity and balance.

I have very serious doubts about the continued validity of the scarcity rationale on the broadcast industry. Regardless of its validity in the broadcast arena, however, it is absolute nonsense in the context of cable television.

I think the key here in cable versus broadcast, in broadcast there is no continued validity to the scarcity rationale. But in cable, the cable operator does not even use the spectrum in delivery of service to subscribers. There is no significant technical limitation on the cable industry, and we have got 30 and 40 channel systems that are quite routine.

I believe that the diversity rationale also does not hold up at all. You take our San Diego Cable System, we have 14 broadcast channels, a religious program service, 3 movie services, 24-hour-a-day news service, 2 children's program services, a Spanish program service, a sports channel, a music channel, a health channel, a financial news channel, a channel devoted to congressional activities, a variety of public access and local program services. It is difficult to imagine that the consumer would want or need greater diversity.

In sum, Mr. Chairman, we fully support S. 1917. I thank you.

The **CHAIRMAN**. Thank you, Mr. Myhren.

[The statement follows:]

STATEMENT OF TRYGVE MYHREN, CHAIRMAN, AMERICAN TELEVISION AND COMMUNICATIONS CORP.

I. INTRODUCTION

Good morning, Mr. Chairman and members of the Committee. My name is Trygve Myhren. I am Chairman and Chief Executive Officer of the American Television and Communications Corporation (ATC), a subsidiary of Time Incorporated. ATC today operates more than 125 cable systems serving over two-and-a-quarter million homes. We provide cable service in large and small communities in 33 states across the nation.

Mr. Chairman, the issues we are discussing today are not only of extreme importance, they are of extreme urgency. the fairness and political rules which are the primary focus of S. 1917 are significant by themselves. However, these rules are part of a much broader problem. Somehow, we have gotten off the track of strong First Amendment values. We have lost sight of the central role which free speech plays in a democratic society. Attempts to limit speech or to prescribe what a particular speaker may say have become routine. Municipalities all around the country are attempting to trade their control over the rights-of-way for authority to control cable operators' speech. Efforts to prevent certain types of speech are commonplace and well-documented. However, I am also particularly concerned about how often mayors and city councils try to tell us what services to put on the system. There appears to be very little sensitivity to the overall impact such activity has on the free flow of information. In the media generally, and the cable television industry particularly, the number of limits on free speech is staggering. Access obligations, must carry rules, adult programming restrictions and the fairness and political rules are only a few examples. Economic regulations, such as exorbitant franchise fees and detailed rate regulation, indirectly, but no less ominously limit our ability to provide maximum diversity of information.

We appreciate your own personal commitment to strengthen support within Congress and the public at large for reaffirmation of fundamental First Amendment rights. As you know, we are vigorously opposing speech restrictions at the federal, state and local level. In testimony before this Committee last year, I noted the poor state of the cable industry's First Amendment status and announced that Time Incorporated and ATC would undertake a comprehensive analysis of the constitutional rights of cable operators, conducted by independent constitutional scholars. I am pleased to report that the study was completed late last year and published as a book, entitled "Cablespeech: The Case for First Amendment Protection."

Our resolve to assert forcefully our First Amendment rights is unwavering. S. 1917 is an important step in this process and would put us back on the track of free and open public debate on controversial and political issues. It also serves notice that our goal is not to preserve the status quo. Rather, we must reclaim the First Amendment rights which have been lost. Mr. Chairman, you should be congratulated for the strong and consistent leadership you have demonstrated in this area.

II. THE CHANGING NATURE OF THE CABLE TELEVISION INDUSTRY

Analysis of S. 1917 must begin with the recognition that cable television systems have grown from largely passive "funnels" for broadcast services to full-fledged First Amendment speakers with substantial program origination and other editorial functions. We have become electronic publishers. This fundamental change impacts both the legal and public policy foundation of the fairness and political rules, as well as other content regulations.

Since the mid-1970s, the cable industry has undergone a major transformation from a system for retransmitting broadcast signals to communities poorly situated for over-the-air reception, to a national, satellite-linked telecommunications medium, delivering diverse video and non-video programming and information services. Cable oprators now bring a significant degree of programming diversity to American viewers. In addition to offering broadcast services, we choose from approcimately 40 cable program services offering movies, sports, special events, news, religious programming, weather, health, and minority programming.

More importantly, however, program origination has become a fundamental element of the business. Many cable operators, large and small, are generating programs geared to issues of particular local interest. These programs range from live city council meetings to local theatrical and musical performances. In addition, cable operators are beginning to produce editorials. Our "American Viewpoints" series, consisting of editorials on important local, national and international issues, is now being seen throughout the U.S. on ATC systems. Though this expression of opinion, cable operators are achieving recognition as a significant local voice on issues of national, as well as local scope.

These changes have strengthened the role of the cable operator as a programmer and editor. He decides whether and how to produce his own programming and choose from the wide variety of programming available from other sources. He has significant editorial control and functions very much like a newspaper editor. In short, the cable operator is a full First Amendment speaker entitled to the panoply of constitutional protections traditionally afforded the print media.

III. THE FAIRNESS AND POLITICAL RULES LIMIT THE MEDIA'S ABILITY TO CONDUCT FULL AND OPEN DISCUSSION OF CONTROVERSIAL PUBLIC ISSUES

By their very nature, content and access regulations restrain the manner in which the media communicate. Government-imposed rules which limit what a speaker can say or direct him to speak in a certain fashion necessarily circumscribe the speaker's ability to conduct a full and open discussion. Such rules result in truncated discussions, often summarily treating or avoiding controversial topics altogether. A lack of vigor and candor is a natural by-product of content regulation.

This can happen with any content or access regulation. For example, the must carry requirement which forces a cable operator to carry with tenth or eleventh broadcast signal may prevent him from distributing the Black Entertainment Network or the Cable Health Network. However, when the regulations are directed at the discussion of controversial public issues or political speech—such as the fairness or equal opportunities rules—their tendency to limit frank public discussion is particularly troubling. It is in these areas that the public's need to be fully informed is most critical. Consequently, it is in these areas that speech limitations should be most discouraged and the media should have full rein to "take the gloves off" and pursue controversial issues in a manner that will spark public concern and debate.

Yet, surprisingly the opposite is true today. The media is forced to tiptoe around controversial and political issues, constantly on alert that its attempts to initiate public discussion will run afoul of federal regulations. The severe negative impact on the public's ability to remain informed on the crucial issues that affect their everyday lives in clear. The "findings" to S. 1917 state the problem very well: the regulations "chill the editorial discretion of the media and cause self-censorship, thereby damping the vigor and limiting the variety of public debate."

These concerns are not theoretical; they are played out daily in the operation of our cable systems. Basically, there are two reasons why the rules ultimately limit the discussion of controversial and political issues. First, the rules are every costly and administratively difficult to deal with. Second, they intrude very deeply into the cable operators' ability to speak freely.

The cost and administrative difficulties associated with the rules can be enormous. The precise recordkeeping, prescreening and tape retention necessary to comply with the rules and protect oneself from complaints of noncompliance are significant enough on a single broadcast channel. The problems are increased many times over for cable operators. The average cable system has 12 channels and the capacity to generate 288 hours of programming per day. Assuming an employee could screen eight hours of programming in a normal work day, an additional 36 employees would be necessary to fully comply with the rules. Most 12-channel systems only have 15–20 employees to run the entire system. The salaries of the additional employees necessary to comply with one federal rule could reach an additional $720,000 per year. That average system earns a reasonable, but not excessive rate of return. A three-quarter of a million dollar bite would very quickly move that return from the black to the red.

These figures contemplate only the costs associated with monitoring to determine if the rules apply. In those instances where the rules do apply, the costs to produce and distribute programming to satisfy the obligations are significant. And, costs arising from defense of a fairness doctrine complaint can be very severe. A Rand study of a fairness doctrine complaint against KREM-TV in Spokane, Washington, is illuminating. The complaint was filed in October 1971. The FCC's resolution, finding no violation on the part of the station, was not issued until May 1973, 21 months after the broadcasts in question. KREM experienced legal fees of $20,000. Travel and other expenses added considerably to the costs.

More important, however, was the amount of time spent by top-level station personnel and the emotional strain on them. The president and vice-president of the station devoted a total of 80 hours; the station manager, 207 hours; and six members of his staff, an additional 194 hours. A total of 480-man hours of executive and supervisory time was spent on this matter. One cannot simply shrug off the chilling effect, conscious or subconscious, such a process has, only on the particular broadcaster, but to all who are subject to the rules.

Ideally, for example, topics addressed in our "American Viewpoints" series should be selected and presented solely on the basis of our editorial judgment considers the concerns and interests of our subscribers. However, the costs of the fairness and political rules forces us to also consider whether any particular topic will trigger a vague obligation to afford "adequate opportunity for the presentation of contrasting viewpoints." And, this obligation would apply in 125 cable systems across the country. Determining whether such an obligation arises is tantamount to crystal ball gazing. Does the editorial raise a "controversial issue of public importance?" Have contrasting opinions been adequately expressed elsewhere on the cable system? What constitute an adequate opportunity for contrasting viewpoints?

There are no easy answers to these questions. As a result, the type of administrative nightmare described above is a very real possibility. For a cable operator this situation very definitely affects the program choice, and suggests that problems can be most easily avoided by limiting discussion of controversial issues.

In addition to the cost and administrative difficulties, one should not discount the personal dynamics in assessing the impact of the rules. ATC is a large organization. Yet, when it comes to exercising an editorial voice, we react very personally. Like any individual, we as a company find abhorrent the notion that others can control what we say and when we say it. This is a natural reaction, very much like the reaction you or I would have if someone attempted to tell us what to say. The reaction is no different because we are a company.

As a result, we take steps to avoid application of the fairness and political rules to our speech. We do not circumvent the rules in those situations where they apply. But, we do try to limit the number of instances in which they apply. By doing so, we limit the number of instances in which external parties are permitted to tell us how to speak. This reaction is absolutely ingrained in the American spirit. It is how I react and how you would react in the same situation. Americans simply do not tolerate being told what to say. It is basic to our perception of ourselves as individuals.

The impact on public debate is unfortunate. The rules trigger an inevitable negative reaction which limits public discussion on controversial and political issues. Because of cost, administrative problems, and inherent free speech limitations, the rules create perverse incentives to avoid discussion of controversial or politicial issues.

Finally, the rules create additional problems for the cable industry. This is because the rules were designed for the broadcast service. Cable is a very different medium. Because of their large capacity, cable operators can provide "narrowcast" services, devoted to very specialized audiences. The fairness and political rules would severely inhibit cable systems from taking advantage of this capability by requiring carriage of political and public interest programming even on these specialized channels. Cable operators would thus be prevented from meeting the demand for programming tailored to the specific needs and interests of particular groups. It is incongruous that the fairness and political rules, imposed in the name of diversity, would work to weaken the development of narrowcast services, perhaps the most promising and unique opportunity for substantially increasing diversity in the video business today.

Similarly, cable operators' ability to offer commercial-free services will be negatively impacted if they are forced to carry political advertisements. Again, cable operators' ability to utilize their multi-channel capacity to provide services which are different in nature, i.e., diverse, from traditional broadcast services is diminished.

It should also be noted that because of their multi-channel capacity, cable operators can offer political candidates access to voters at rates substantially below those available in the broadcast media. These lower rates will eventually help cable expand its presence as a political voice. That will increase political speech generally and may be particularly significant for fledgling, under-financed candidates. However, the equal opportunities rules, by imposing a complicated set of obligations, may induce cable operators to avoid making their facilities available for political speech.

Another important distinction between cable and broadcast relates to the nature of services provided and the manner in which they are presented. For example, a broadcaster may have a few hours a day devoted to news programming, usually broken down into hour and half-hour segments. Many cable operators, on the other hand, provide a 24-hour-a-day news service. The program is news-oriented, but obviously is not presented in the same fashion as a half-hour broadcast news program. The differences in presentation effect the way in which the equal opportunities provision is applied. Does the total service package qualify as an exempt newscast, news interview or documentary? The exemptions were created specifically for traditional broadcast-type news presentations. Broadcasters are necessarily limited by time constraints. In a 24-hour service, however, new and innovative ways of presenting the news can, and currently are being tested. These novel concepts may not fit within the exemptions to the equal opportunities rules. Programmers may therefore be reluctant to break from the traditional modes of news presentation.

IV. THERE IS NO LEGAL OR PUBLIC POLICY BASIS FOR IMPOSING THE FAIRNESS AND POLITICAL RULES ON THE CABLE TELEVISION INDUSTRY

There is simply no legal or public policy rationale for applying the fairness and political rules to the cable television industry. The rules clearly restrict First Amendment freedoms by intruding into the cable operators' right to determine the content of the information delivered over their facilities. In order for these rules to be constitutional, therefore, they must serve a "compelling state interest." Although courts have held the rules are valid in the context of the broadcast medium, no court has ruled they are constitutional as applied to the cable television industry. Further, while the Federal Communications Commission has applied the rules to cable television, it has never been comfortable doing so. In fact, the practical and legal problems associated with imposing the rules on cable operators led the Commission last year to institute a Notice of Proposed Rulemaking which would eliminate the rules or severely limit their scope in the cable television industry.

In the broadcast context, the scarce nature of the spectrum and the perceived need to ensure diversity and balance have traditionally been the "compelling state interest." Diversity and balance are the public policy rationales which, it has been argued, require the government to place restraints on broadcasters. Scarcity is the jurisdictional "hook" which allows the government to impose such restraints in the face of the First Amendment.

I have very serious doubts about the continued validity of the scarcity rationale to justify regulation in the broadcast industry. There are today more broadcast stations in this country than newspapers. The majority of Americans have access to more than one local broadcast station. Far fewer have access to multiple local newspapers. Yet newspapers are not considered scarce.

Regardless of the validity of scarcity in the broadcast arena, however, it is nonsense in the context of cable television. Very simply, cable operators do not use the spectrum in delivering services to subscribers. Further, there is no significant technical limitation of any kind in the cable industry, as the courts have repeatedly recognized. Cable is a multiple channel medium. Systems with 30 or 40 channels are routine and 100-channel systems are now being constructed. Scarcity cannot satisfy the "compelling state interest" for regulation of the cable industry.

Nor can the diversity rationale meet the "compelling interest" test. It would be difficult for a cable operator to avoid having a range of opinions expressed and topics discussed on even a 12-channel system, no less on larger systems. Cable, through the technology of multiple channels, naturally achieves balance and diversity.

For example, ATC's San Diego cable system carries 14 broadcast channels, a religious program service, three movie services, a 24-hour-a-day news service, two children's program services, a Spanish program service, a sports channel, a music channel, a health channel, a financial news channel, a channel devoted to congressional activities, and a variety of public access and local program services. This range of programming satisfies the goals of diversity and balance without government intervention. It is difficult to imagine that consumers could want or need greater diversity, or that, within the context of the total cable system program package, a particular issue would not be covered fairly, with a balanced presentation of contrasting viewpoints. The absence of any record of complaint or abuse by cable operators in this area demonstrates persuasively that government regulations are not necessary to achieve the public policy goals of diversity and balance.

Finally, in assessing the existence of diversity and balance, the whole range of alternatives for consumers to obtain information and entertainment services must be considered. There now exists a broad array of video technologies and other sources that provide competitive services. In addition to the diversity and balance achieved on a cable system, consumers have access to subscription television, multipoint distribution service, over-the-air broadcasting, satellite master antenna systems, video cassettes and discs, movie theaters, low power television, and direct broadcast satellites. With so many alternative sources available to consumers, the public policy rationale for the fairness and political rules is destroyed.

V. CONCLUSION

Cable television is in itself a diverse and balanced medium. In addition, consumers can choose from a wide variety of alternative technologies and other sources to obtain information and entertainment services. The goals of diversity and balance are achieved through the marketplace without the need for intrusive government regulation. The fairness and political rules simply do not make sense in this environment.

More importantly, because of severe administrative, legal and program production costs, the rules inevitably limit, rather than stimulate discussion on important controversial and political issues. The rules are not supported by any credible public policy rationale and clearly fall considerably short of meeting the constitutional standard of "compelling state interest."

In sum, Mr. Chairman, we agree that the rules should be eliminated and fully support your effort in S. 1917 to do so.

The CHAIRMAN. Mr. Wilson, you have a particularly interesting story.

Mr. WILSON. Interesting and frustrating at the same time.

Mr. Chairman, members of the committee, my name is Barry Wilson. I am vice president of operations of United Cable Television Corp. On behalf of United Cable Television, I want to thank you for the opportunity to appear before you today to discuss a matter of paramount importance to the maintenance of our free society, the freedom of our people to communicate with one another.

Previous witnesses before this committee have done an excellent job of describing and underscoring the crucial function of free expression. It is simply the single freedom through which all other freedoms are preserved. Unfortunately, led by some questionable court decisions and well-meaning social engineers, the laws under which we in the electronic press must operate have subverted the pervasive and fundamental democratic character of expression. The technology of expression became more significant than the protection of expression.

Mr. Chairman, your bill, S. 1917, is a courageous step toward restoration of our most basic rights as Americans. United Cable Television and the entire cable industry applaud your efforts.

As a cable television operator, I can tell you that the experience of our industry is not replete with Federal intrusions on our editorial processes to the degree suffered by our colleagues in broadcasting. I suspect this reflects the fact that cable has only recently come into its own as a bona fide alternative to print and broadcasters as a source of news and information.

However, as this committee found in its deliberations on S. 66, known as the Cable Telecommunications Act, the local regulations under which cable is shackled have led to even more usurpation of cable's freedom. They are more restrictive and repugnant than any intrusion sanctioned by the equal-time law and the Fairness Doctrine.

The recent experience of our cable system in East Lansing, Mich., is a dramatic illustration of the extent to which local regulation can be invoked as a tool of censorship. Regrettably, the experience is not an abberation, but is becoming closer to the no

Our franchise agreement with East Lansing contains wording that calls for the city and United to mutually agree to the channels being carried on the system. At first glance it would appear that United created its own difficulties by signing a document that we are now claiming is violative of our rights under the Federal Constitution. Without digressing into a franchising horror story, suffice it to say that the decision was one of accepting the wording or not getting the franchise renewal.

In August of 1982, and pursuant to terms of that franchise, United first proposed to the city that Christian Broadcasting Network, CBN, be added to the channel lineup. Although the August proposal was withdrawn for reasons not associated with the suggested carriage of CBN, the East Lansing Cable Commission did request a written description of the programing carried on CBN and another channel United was requesting to carry.

During the period from December 1982 to October 1983, United continued to receive requests to carry CBN by East Lansing residents. In October, because of the sale of one and the combining of two other services being carried on the system, there existed an opportunity to add services. The services proposed were Financial News Network, Cable Health Network, and CBN.

On November 14, 1983, the Cable Commission held a meeting during which the services United wished to add were discussed. After the cable commissioners had commented on the services, comments were heard from the floor. The commission then voted to deny the package as submitted by United and scheduled a public hearing for November 29.

Of the 36 citizens who were heard from from the floor that evening, 23, including one of whom presented a petition with 230 names, spoke in favor of CBN.

After the public hearing, the commission met to entertain a motion on the proposal. The motion was to accept Financial News Network and Cable Health Network, but to object to CBN. One of the commissioners stated a legal question about the use of the airwaves were not relevant to the issue, nor was it a matter of separation of church and state, but a matter of how best to use the last available channel on the system. The motion carried 4 to 1.

I totally agree with the commissioner's statement that there did not exist an issue of separation of church and state, because the cable television system is a private entity not an extension of the governmental franchising authority.

I take exception to the statement that the legal question regarding use of the airwaves is not relevant to the issue. Not only is it relevant, but I submit, Mr. Chairman and members of the committee, that it is of the utmost importance. The bill which is before you is important to correct the excesses and deficiencies that exist at the Federal level, but relief is necessary at the State and local level as well.

In closing, I would like to offer a quote from the Roy City, Utah, opinion of Judge Bruce S. Jenkins, Community TV of Utah *v.* Roy City, Utah, which I believe comments very appropriately on the first amendment as it relates to cable TV.

> Why must a community tolerate? Because the first amendment, as interpreted by the High Court of this land, says so. The first amendment is the barrier that pre-

> cludes others from taking from us what we cannot give away. There are areas of personal freedom that are so important they are inalienable. They belong not to the Government but to the people. The first amendment shields us from governmental excesses, no matter who occupies governmental offices. * * * Diversity is also tolerated because the self-appointed monitor of purified communication may be in error.

Thank you.

The CHAIRMAN. Thank you, Mr. Wilson.

Larry?

Senator PRESSLER. I have two questions. Unfortunately I have to appear at another committee, but I hope to come back because this is fascinating.

I would like to ask each panel member: Would you apply your reasoning to DBS? Would you want to be sure that this bill would apply to them also?

Mr. SHAPIRO. I would apply the reasoning to DBS, yes.

Mr. MYHREN. Absolutely.

Senator PRESSLER. You have no problem with that?

Mr. WILSON. No.

Senator PRESSLER. You feel the scope of the bill will cover direct broadcasting satellite?

Mr. WILSON. Once you start trying to make exceptions, or treat somebody a little bit differently, you create a whole set of new problems. So I see no reason to exclude anybody.

Senator PRESSLER. You have indicated that cable systems have plenty of available channels to accommodate different points of view. Does that mean that you do, or would give anyone access to a channel to air their particular views on an issue? Should we mandate access?

Mr. SHAPIRO. I, of course, am not a cable operator; I am only a lawyer.

Senator PRESSLER. Well, would you advocate this?

Mr. SHAPIRO. No, I would not advocate that. I think mandatory access raises all of the problems of Government control of communications that are raised by the provisions that are under consideration in the Freedom of Expression Act. It places Government in an umpiring role in determining who shall get access, when, and how, and on what channel, and under what terms and conditions.

In light of the multiple channel capacity of cable systems, and the proliferation of media expression, including not only cable but possibly direct broadcast satellite and direct broadcasting, and numerous other types of media, electronic media that the FCC is implementing these days, there is no compelling justification for Government to step in and tell cable operators——

Senator PRESSLER. Not necessarily to mandate. Let us say the Remove Intoxicated Drivers Group, who we will hear from later, walks in and you have an extra channel or access to a channel. There are plenty of available channels to accommodate differing points of view. But would you envision that they would just be given access to a channel? What if the owner consistently said no?

Mr. SHAPIRO. Well, I think it should be left to the editorial discretion of the cable operators, just as would be the case if they walked into a newspaper office and asked the newspaper editor to provide some space in the pages of his newspaper. Many cable systems would provide time on the channels for just this type of programing as part of the good citizenship that most cable operators try to practice in their own communities.

But if the cable operator does not provide that group time on the cable system, it does not disable that group from reaching the public. There are numerous other ways for that group to reach the public. As long as that is the case, the way I read the first amendment is that that is an area the Government should stay away from and not get into umpiring who shall have access when and how.

Senator PRESSLER. What about an owner who just refused to do anything and consistently said I do not have to, I am not going to, period.

Mr. MYHREN. What would the Government do in that case with regard to a newspaper?

Senator PRESSLER. Well, there are no such rules applying to newspapers. But my question involves cable. Let us stick with that because I do not advocate applying this to newspapers. Your answer is like saying if one boy is bad, the other one should be able to be bad, too. Let us stick with the cable.

Let us say that we have a very influential cable system. They say, we are not going to do a thing in this area, period. The public be damned.

Mr. MYHREN. I think they should be treated just as the newspaper, because there are absolutely no differences. I do not think it is bad that someone exercises editorial judgment at a newspaper, and I do not think it should be bad that they do the same thing at a cable system.

Senator PRESSLER. So if some major cable operator just decided to take that approach permanently, you would have no problem with that?

Mr. MYHREN. I think, first, it is highly unlikely. In a cable system context, there are sufficient channels available so that I doubt that you could find an instance in which that has ever happened. But should it happen, there would probably be reasonable justification for it, just as there is in a newspaper context.

Senator PRESSLER. One final question. What if some cable operator in a major city should unabashedly decide he is going to support a candidate for the Senate or Congress put him on 20 hours a day every day.

The CHAIRMAN. He will lose his audience.

Senator PRESSLER. Let us say the cable operator himself was running, and he owned the system, and he just put himself on during every prime time for 3 hours, just blatantly put himself on. He could do it with good taste, with the advice of a good consulting firm. Is that fair to the other candidates?

Mr. MYHREN. I think, Senator, that what would happen in that case with, let us say, 30 or 40 channels on that cable system with alternative programing, all of the broadcast programing, video cassettes, DBS, many other entertainment and informational sources available, that nobody would watch him. As a matter of fact, all of the other media would take off after that person and damn him. He would doom himself to defeat by taking that approach.

Senator PRESSLER. If he did this very blatantly. But if he did it subtlely, with the advice of a great public relations firm, he could be very influential with who was elected to the Senate, if it was cable in New York or cable in South Dakota. I do not necessarily think the other media would take off after him.

Mr. **Myhren**. I think the local newspapers would.

Senator **Pressler**. I think people probably would not know about it until after it had happened if it were done very skillfully. The point is that there are some dangers in this system, I think you would have to say.

Mr. **Myhren**. I do not think there are, sir.

Mr. **Wilson**. I would just like to comment on that briefly. You are dealing with a hypothetical situation, and we have a lot of regulations that we live with under this form of government that we exist under that are created because of some hypothesis, not because of something happening in reality. So I do not see any reason, because that hypothesis might exist in the real world, for a cable system to be treated any differently than a newspaper.

The **Chairman**. I would wager this is exactly what would happen. Mr. Myhren put his finger on it. If this bill passes, it would only be a statute, and any future Congress could unfortunately reenact the present doctrines, the laws we have now. If you have one cable operator committing abuses, I agree with Mr. Myhren that direct broadcast satellite, over-the-air television, over-the-air radio, and newspapers, would collectively attack that cable operator for abusing the process. They would for fear that that kind of an example would be used to reimpose the content doctrines on everybody.

Senator **Pressler**. Well, of course in a lot of areas there are not that many alternative media. There may be just one or two and if this is done skillfully—it might not be a candidate: it might be an issue. A referendum or something of that sort. I think there are some dangers in some instances.

Mr. **Myhren**. Senator, where that argument might best be made is some place where there is just a newspaper, let us say, some truly remote town where there is only a newspaper, and yet we do not apply these types of rules to a newspaper.

Senator **Pressler**. I know that. But that is an argument that does not make much progress with me, because you are saying that if the other guys can do it, we can do it. Let us stick with your own problem.

Mr. **Myhren**. You see, I do not think anybody is really doing it. I think it is hypothetical.

Senator **Pressler**. I think it is a very weak argument to say that because somebody else can do it, we should be able to do it. I think we have to face it on the merits of what might happen. Nevertheless, I think you have responded very well.

The **Chairman**. Mr. Myhren, in your statement you make reference to your programing in San Diego. You said two children's channels? Did I read it right?

Mr. **Myhren**. Yes.

The **Chairman**. You have two channels that carry solely children's programing?

Mr. **Myhren**. That is correct.

The **Chairman**. What is your source of the programing?

Mr. **Myhren**. Overall?

The **Chairman**. No, the children's programing.

Mr. **Myhren**. It is extremely diverse. In one case, I believe it is Warner Communication that supplies Nickelodian, and in another case a cooperative venture among a number of companies provides another service.

The **Chairman**. Do you know how many hours a day of children's programing you have on those channels?

Mr. **Myhren**. Well, I think Nickelodian is some 16 hours a day, and it varies. There are children and there are children. There are 5-year-olds and there are 15-year-olds, and there are programs that appeal specifically to each of the age groups within that.

The **Chairman**. The reason I asked is because the argument is raised over and over: There will be no children's programing if it is not compelled by the FCC.

Mr. **Myhren**. I think that notion, wherever it came from, is absolutely inaccurate. The whole concept of cable, because it is a subscriber-supported medium, is that you must appeal to incremental specialty audiences. Every time you can figure out a new interest group, you try to come up with something that will appeal to that group. That adds to your subscriber base, and it is very different obviously than what has been said to be the broadcasting mode.

Cable is really one of adding small incremental special interest audiences. Children's programing is something that you would never run a cable system without having children's programing.

The **Chairman**. You are much more like radio in that sense. You can exist on each channel on a narrower segment of the audience so long as you understand it, target it, and play to that audience.

Mr. **Myhren**. That is right. And the cable operator overall, let us say as the overall editor here, wants to make sure that every spectrum of opinion and interest is represented, because if he does that correctly his overall subscribership will increase, and that of course provides the economic base.

The **Chairman**. Mr. Shapiro, let me pose a hypothetical to you because you are the lawyer in this group.

Life Publications, which is a small outfit in Illinois, has some daily newspapers and also owns a 10-percent interest in a cable system. I talked with their manager a year ago when I discovered that they were putting their editorials on cable. Initially they were putting them on in text, but he said they were later going to do them in video. These would be the same exact editorials they run in their newspaper.

I asked him what they were going to do about requests for response to them, or what they had done in the past. He said they had never had a request. I asked what they were going to do in the future? He said as a matter of right, we will turn it down. I said, on what basis? He said, the first amendment.

Assume the FCC decides it is going to apply the content doctrines to cable, the same as they apply to over-the-air. Assume that case goes to the Supreme Court. Is the Supreme Court, in essence going to follow Red Lion? Is the Court going to say, that cable is scarce in some way, and that is an editorial, and it requires a response?

Mr. **Shapiro**. I do not think they will follow that line, because I think that the Supreme Court will take the same view of the scarcity doctrine that the D.C. Circuit did in the *Home Box Office* case. The D.C. Circuit derived its position from the Supreme Court's decision in *Miami Herald* v. *Tornillo.* That decision said that economic scarcity does not have constitutional significance.

The scarcity of the radio frequency spectrum to the extent that it has existed in the past has been seen as a physical type of scarcity, and that is the only type of scarcity that the Court has accorded constitutional significance to before. If they get to scarcity in other contexts, it opens a Pandora's box that is very difficult to determine where they are going to draw the line and stop.

What if, during the time of national emergency, there was a shortage of newsprint? Would that give the Government the right to impose the Fairness Doctrine on newspapers? I do not think they are going to want to open that box.

The **Chairman**. Professor Powe's argument is very valid. Everything is scarce. There is no unending supply of anything. So under that theory, you could regulate newspapers because there is not enough newsprint, or there are not enough trees, or there is not enough of something so that everybody can print newspapers.

Mr. **Shapiro**. Scarcity is also a function of price. Licenses do not cost anything, so you would naturally have more people standing in line trying to get them than resources which you have to purchase and whose values and costs are determined in the economic marketplace.

The **Chairman**. I was also intrigued with the evidence presented by the Federal Communications Commission when their chief scientist testified earlier. There were about 1,800 transfers of broadcasting properties last year, but 700 were minority transfers, so they were not changing the majority ownership. About 1,100 were major changes. Ten percent of those were contested—about 100 were contested, but about 1,000 were not. They just went through routinely. Jones owned the station and now Smith owns the station.

So there are 1,000 broadcast properties that changed hands without contest in 1 year. That is a reasonable market. I would wager you can count on two hands the number of daily newspapers that changed hands last year. I am not including going out of existence as changing hands. I mean purchases. It just does not happen.

Mr. **Shapiro**. That is true. Last year before this committee there was extensive testimony from media brokers about the nature of the broadcast marketplace, and it is an active marketplace. Stations have values. People who want to acquire broadcast facilities have no trouble doing so if they can find the dollars they need in order to do that.

The FCC itself has facilitated these transfers by backing out of programing regulation, at least in radio.

The **Chairman**. You can pick up any Broadcasting magazine and see properties for sale, and the price range the owner is looking for. You probably would not find many advertisements in any publication which read: For sale, the St. Louis Post-Dispatch, highest offer accepted; or, for sale, the Seattle Times, or the Seattle PI. Those kinds of ads do not appear.

Mr. Shapiro. Like other businesses, the price of the facility needs to be a function of its cash flow. You take other factors into account, but that is the principal one.

The Chairman. Gentlemen, I have no other questions. Thank you very much.

Next we will take Mr. James Batten, the president of Knight-Ridder, and Mr. Bill Small, the president of United Press.

Go right ahead, Mr. Batten. Good to see you again.

STATEMENTS OF JAMES K. BATTEN, PRESIDENT, KNIGHT-RIDDER NEWSPAPER, INC., MIAMI, FLA.; AND WILLIAM J. SMALL, PRESIDENT, UNITED PRESS INTERNATIONAL, WASHINGTON, D.C.

Mr. Batten. Thank you, Mr. Chairman.

I appreciate the opportunity to comment about S. 1917, particularly from the point of view of a traditional print publisher with a strong interest in new electronic information technology.

I am Jim Batten, president of Knight-Ridder Newspapers. We are primarily a newspaper company. We also own television and cable systems around the country, a book publishing company, and some business information networks.

Senator, as you know, Knight-Ridder is one of a number of companies involved in the exploration of the commercial viability of videotex. Last October in southern Florida, in cooperation with AT&T, we began to offer the Nation's first full-scale consumer-oriented videotex service called Viewtron to subscribers in the Dade, Broward, and Palm Beach Counties.

Knight-Ridder represents a sort of microcosm of what is happening within the American newspaper industry in the 1980's. A lot of newspaper companies have sensed both the potential threat and potential opportunity in the whole world of electronic publishing and are trying to see how they can apply their traditional skills—honed in the newsprint-and-ink world—to some of the new entrepreneurial publishing activities.

For example, four major newspaper-based companies, Knight-Ridder, Times Mirror, Dow-Jones, and Field Enterprises are set now, if the economics seem to make sense, to try to become videotex operators on a national scale. For example, videotex affiliation agreements involving my company and others cover 11 percent of all U.S. daily newspaper circulation.

The question that S. 1917 brings into focus for us obviously is this: What is the legal and the regulatory status of this great new ferment of electronic publishing activity? What kind of first amendment protections are available to these new media forms?

This committee has heard a lot recently about the rapid blurring of traditional lines that have divided print and video, with their different tradition of regulation or the lack of it. I think nowhere is that blurring more dramatically clear than in the systems like videotex.

Every night before I go to bed I read news stories from the next day's Miami Herald on my television set, delivered there on demand via telephone lines from a room full of computers in Miami Beach. I also read stories that the Herald does not have room to publish from the AP, from UPI, other wire services, plus stories, opinion columns and editorials from the New York Times and the Wall Street Journal, which are information providers of Viewtron.

Because at the moment Viewtron is distributed exclusively by telephone lines, it is afforded first amendment parity with our more traditional print products. But it is likely, as we go along, that we are going to be using cable television, as well as telephone lines, to distribute this product. Times Mirror in their test in California has already used both telephone and cable.

If we add cable to our now telephone-based delivery system, what does that mean in regulatory terms? Does that mean that Viewtron might suddenly find itself covered by the Fairness Doctrine? Or suppose at some point we decide to blend the telephone-based videotex product with a narrow-band teletext, which involves over-the-air broadcast arrangements? To the subscriber there would not be any discernible difference between a telephone-delivered videotex page and a teletext page delivered over the air. Would the first amendment cover one and not the other?

The FCC assured us last year that teletext was not going to be subject to content regulation, but a future FCC obviously could feel differently, and a court could feel differently. If that happened, we would find ourselves in a strange Alice-in-Wonderland sort of situation. It would be like being in the book-publishing business and having a book where the left-hand page was protected by the first amendment, and the right-hand page was subject to Government review—a crazy sort of prospect.

Senator, I certainly support the position taken earlier by the witness from the American Newspaper Publishers Association and the American Society of Newspaper Editors, who think it is time to treat the electronic media the same—as we have historically treated the print press. But I also believe that the arguments supporting this position go well beyond their impact on well-established electronic media.

I think that today's sort of schizophrenic public policy now threatens the logical development of new information media. Those of us working in this field under existing law and FCC rules face a lot of uncertainty about what the rules of the game are going to be like.

Let me just quickly touch on what I think are the most obvious arguments against content regulation in these new media forms. First and most obviously, there is not any technological scarcity. There is no limit to the number of videotex systems that could be created in a given market. There is no limit to the size of those data bases, or to the number of electronic gateways that you could create from one set of computers to the other.

Second, content regulation has been justified in the past in the electronic media on the grounds that it is needed to assure diversity of programing. Electronic publishing by its very nature will offer a vast diversity of material. We think we have probably several million pages of material in the Viewtron system we are now working on.

Finally, in something this big and diverse there inevitably over time will be complaints about fairness. I think the answer to that is that responsible system operators, like responsible newspaper publishers, will try to do everything they can to make sure their material is fair, accurate, and open to varying points of view.

These systems, because they are created by fallible human beings, inevitably from time to time will fall short of perfection. But the prospect of Government regulation to enforce fairness and balance and accuracy is obviously a chilling prospect, and one that could stiffle the development of all these new technologies.

So I think there are persuasive reasons for Congress to end the historic policy of giving freedom to some forms of expression and regulating others. The arrival of new hybrid forms of expression makes that change all the more warranted.

The CHAIRMAN. Thank you.

[The statement follows:]

STATEMENT OF JAMES K. BATTEN, PRESIDENT, KNIGHT-RIDDER NEWSPAPERS

I appreciate the opportunity to offer some comments about S. 1917, specifically from the perspective of a traditional print publisher with a strong interest in the new electronic information technologies.

My name is James K. Batten. I am the president of Knight-Ridder Newspapers, a Miami-based public company that owns 30 daily newspapers scattered throughout the United States, plus television stations, cable television systems, a variety of business-information ventures and a book publishing company.

As some of you may know, Knight-Ridder is also one of the leaders in efforts to explore the commercial viability of videotex. Late last October, in a cooperative effort with AT&T, we began to offer the nation's first full-scale consumer-oriented videotex service, Viewtron, to subscribers in dade, Broward and Palm Beach counties.

In a sense, Knight-Ridder represents a sort of microcosm of broader developments within the American newspaper industry in the 1980s. Large numbers of newspaper companies, sensing both potential threat and opportunity in the fast-developing world of electronic publishing, are venturing out from their traditional newsprint-and-ink foundations to see if some of their skills and instincts are applicable to these new highly entrepreneurial activities. Last year the American newspaper Publishers Association and the Newspaper Advertising Bureau surveyed 1,735 newspaper publishers in the United States and Canada. Of the 1,067 responding, 66 percent reported that they are already participating in—or seriously considering—various telecommunications ventures. Among them are videotex, low-power television, multichannel MDS, local electronic information services and text-on-cable TV ventures.

Four major newspaper-based companies—Knight-Ridder, Times Mirror, Dow Jones and Field Enterprises—are positioned to become videotex operators on a national scale. Videotex affiliation agreements cover 11 percent of all U.S. daily newspaper circulation. For example, my own company has agreements with publishers in 12 cities (not counting our own newspapers) to proceed jointly with Viewtron ventures in those communities if results from our recent South Florida launch are sufficiently encouraging. Times Mirror has a number of similar agreements.

What is the legal and regulatory status of all this activity? To what degree are First Amendment protections available to these new media forms?

This committee has heard a great deal recently about the rapid blurring of the traditional lines that have divided print and video, with their divergent positions vis-a-vis government oversight, or the lack of it. Nowhere is that blurring illustrated more dramatically than on videotex systems such as Viewtron.

Every night before I go to bed I read news stories from the next day's Miami Herald on my television set, delivered on command via telephone lines from a roomful of computers on Miami Beach. I also read stories the Herald does not have room to publish—plus stories, opinion columns and editorials from The New York Times and the Wall Street Journal, which are information providers to Viewtron.

All this news, of course, is only part of a huge data base that includes all sorts of reference information, educational programming, electronic games, home banking, merchandise-ordering, classified advertising and a long list of other material.

So while we don't think of Viewtron as an electronic newspaper—it's a bigger and more diverse product than that—there is no question that embedded in this data base is a vast amount of material that, taken together, amounts to the equivalent of an electronic newspaper.

Because we currently are distributing exclusively by phone lines, Viewtron is accorded First Amendment parity with our more traditional print products, from which much of its content is derived.

But it is likely that before long, we will be using cable television, as well as telephone lines, to distribute this product. (Times Mirror, incidentally, already has done so in California.) If we add cable to our delivery system, does that mean that Viewtron suddently would be covered by the Fairness Doctrine and the Equal Time rule?

Or suppose at some point we decide to blend our telephone-based videotex product with narrowband teletext, a delivery system that employs over-the-air broadcast transmission. To the subscriber, there would be no discernible difference between a telephone-delivered videotex page and a teletext page delivered over the air. Would the First Amendment cover one but not the other? The FCC has assured us that teletext will not be subject to content regulation, but a future commission could feel differently, as could a court.

If so, we would find ourselves in an Alice in Wonderland world. It would be like publishing a book where the left-hand page was protected by the First Amendment and the right-hand page was subject to government review. Such a prospect boggles the mind, and, of course, makes no sense at all.

I support the positions taken by earlier witnesses representing the American Newspaper Publishers Association and the American Society of Newspaper Editors. The time has come to treat electronic media the same as we historically have treated the print press.

But I believe the arguments supporting this position go well beyond their impact on well-established electronic media, specifically television and radio.

I believe that today's schizophrenic public policy toward the distribution of news, information, ideas and opinion—based on contradictory traditions for print and broadcast—now threatens the logical development of new information media.

Under existing law and the policies of the Federal Communications Commission, those of us working in this field face considerable uncertainty as to what the rules of the game will be. The uncertainties of the marketplace—which are, of course, enormous and carry formidable economic risks—are compounded further by the uncertainties of public policy in this rapidly evolving field.

Let me conclude by emphasizing the obvious arguments against content regulation of electronic publishing.

First and most fundamentally, there is no technological scarcity involved in the new electronic media. There is no technological limit, for example, to the number of videotex systems that could be created in a given market. And there are no technological limits to the size of those data bases, or to the electronic gateways that could be established from those systems to other data bases elsewhere in the country or, for that matter, in the world.

Second, content regulation of electronic media had as one of its asserted justifications the need to assure diversity of programming. But the new electronic media's very nature is to offer incredible diversity of material to its subscribers. We have given up trying to count the pages now available on VIEWTRON, but they number in the several millions. We have strong economic incentive to cater to the information appetites of large numbers of diverse audiences, including relatively small ones. Competition, which seems likely to be extemely vigorous, will help assure diversity of content.

Third, as we contemplate enormous and diverse data bases now rapidly taking shape, I am sure that there will be occasional complaints about "fairness." Responsible system operators, like responsible newspaper publishers, will strive to assure that the material available to their subscribers is fair and accurate and fully open to varying points of view. Undoubtedly these systems, like other creations of fallible humans, will fall short of perfection from time to time. But the prospect of government regulation to enforce fairness and balance and accuracy is a chilling prospect, and one that could well stifle the development of these new information technologies.

There are persuasive reasons for Congress to end our historic policy of assuring the freedom of some forms of expression while regulating others. The arrival of new, hybrid forms of expression makes that change all the more urgent.

The CHAIRMAN. Mr. Small?

Mr. SMALL. Mr. Chairman, the occupational hazard in your line of work is hearing the same arguments over and over again, and since I have only a modest pride of authorship, if you like I would be happy to submit this for the record and leave us more time for discussion.

[The statement follows:]

STATEMENT OF WILLIAM J. SMALL, PRESIDENT, UNITED PRESS INTERNATIONAL

Thank you, Mr. Chairman and members of the committee for this opportunity to comment on legislation designed to remove inhibitions on the First Amendment rights of broadcast and print journalists.

I am William Small, President of the United Press International. Prior to this position, I worked in broadcast journalism for some thirty years including seventeen years at CBS and two and a half years as President of NBC News. I then came to UPI in September, 1982. My time at CBS News included eleven years as head of the Washington News Bureau before moving up to New York as Senior Vice President of CBS News. I have served in a number of capacities in journalism societies including the national Presidencies of both the Radio-TV News Directors Associations and the Society of Professional Journalists, Sigma Delta Chi.

UPI serves both print and broadcast journalism and operates a radio news network. We also serve a new breed of information retrieval services which provide news and other information to private homes and offices.

I know that you have had a wide variety of expert testimony already so I will try to be brief. The various restrictive rules—such as the Fairness Doctrine, Equal Time, and so on—which have saddled broadcasters for so many years, have always appeared to me to be a clear violation of the spirit and intent of the First Amendment. Broadcasting didn't exist when the founding fathers recognized the vital need for free expression and indeed, without the Bill of Rights, they could not have formed the Constitution nearly 200 years ago. But Madison and Jefferson and those other far-sighted pioneers of a democratic state would not hesitate to include all forms of a free press were they preparing a blue-print for a democratic existence in the 1980's rather than the 1780's.

Indeed, the matter is particularly pertinent in this decade as, increasingly, the word is transmitted electronically across this country and the world. UPI, for example, is in the process of distributing all its news wires domestically by satellite transmission. Major newspapers, like the nation's largest, the Wall Street Journal, the first national daily, USA Today, and the New York Times, now move copy across the country by satellite. Will we see an attempt some day for the Federal Communications Commission or others in the federal establishment to extend the Fairness Doctrine or Equal Time to these transmissions? I'm sure that the temptations will be there. Even if these inhibitions on the free flow of information are limited to our present systems of broadcasting, is this proper in a complicated world where information dissemination is vital to public understanding and stronger than ever in influencing governments—including nondemocratic states I might note.

These regulations stem from a need, over half a century ago, meant to keep radio signals from crossing into each others' channels. Somehow, it extended into content. To me that clearly violates the First Amendment which demanded that there be no "prohibition of the free exercise" or "abridging" of freedom of speech or of the press.

In the landmark case of *CBS* v. *The Democratic National Committee*, the late Justice William O. Douglas recognized the link between the quill pen and our sattelite age technology when he wrote "My conclusion is that TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines. The philosophy of the First Amendment requires that result, for the fear that Madison and Jefferson had of government intrusion is perhaps even more relevant to TV and radio than it is to newspapers and other like publications." He added "One hard and fast principle which it announces is that government should keep its hands off the press."

Increasingly newspaper publisher recognize their kinship to broadcast journalists in a period when sattelite delivery blurs the lines even more. Arthur Ochs Sulzberger, publisher of the New York Times, made this his central thesis when he was honored by Columbia University last November. In addition to using the airwaves to transmit copy for editions across the country, he noted that an increasing number of newspaper publishers are taking pioneer roles in developing both teletext and videotext experiments.

The hoary old arguments for government regulation over broadcast journalism just do not stand up today. The scarcity of frequencies argument is absurd in a time when there are over five times as many radio and television stations as there are daily newpapers. As for the argument that "the airwaves belong to the people", The former Secretary of State, Dean Rusk, who had his own problems with broadcast coverage, once dismissed that cliche by noting that the North Star and gravity also "belong to the people".

The libel laws give adequate protection to those who feel that they might be maligned in any freeing of broadcasters. The great history of fair play ingrained in every important broadcast organization is further protection. Perhaps the greatest protection lies in the good common sense of the American people. They are quick to characterize the bias they perceive in those who provide information and measure them accordingly, a fact that certainly will also serve to remind those in the mass media that mass audiences want to hear all sides of important issues.

We will not always please our readers and listeners— we do not now. However that is not the role of a free press. In a brilliant essay in TIME after the press was excluded from the landings in Granada, the magazine's Editor-in-Chief, Henry Grunwald, wrote "Certainly the press has no corner on virtue—far from it. Journalists exaggerate, misunderstand, mislead. They can be irresponsible in big ways and in small . . . but freedom of the press, like all freedom, has its risks. It cannot apply only to journalists who are always responsible or positive. Such freedom is not freedom at all. On balance, for all their doubts about the press, Americans have usually felt that it represented a pretty good bargain. The occasional outrageous or merely irritating lapse is an acceptable price for journalism's role as witness and watchdog."

I can think of no better description of what we do or what we are—"witness and watchdog." Passage of S. 1917 will make that all the more possible.

The **Chairman**. You are very generous. I do appreciate that, Bill. I read the statements last night, and I do have some questions.

First, I would like Mr. Batten to elaborate on the chilling effect regulations will have, not on the news, but on the new technologies. We are just on the threshold—in fact, we are not on the threshold, we are here—of an extraordinary burst of different forms of technologies and an expansion of existing technologies. So, I want you to comment a bit more on how the doctrines may chill that expansion. Not what you might distribute on them, but the question of whether you even want to get into them.

Mr. **Batten**. Well, Senator, there are very large economic uncertainties that surround these new systems. There are great questions about which are going to find niches in the marketplace. So, if you compound that economic and marketplace uncertainty with legal and regulatory uncertainty, you have raised the possibility that a lot of companies will be much more cautious in charging into this field and trying to decide what works.

It is just not clear exactly how you would—I have not thought this through, and I am not sure I could—how you would run the system that View Tran is today in a world where you were dealing with the Fairness Doctrine and the other related rules.

The **Chairman**. Mr. Small, let me ask you a question. You have had long, long experience in broadcast journalism. You are familiar with the argument used especially conservative groups that the broadcast media, particularly television, is liberal. They cite polls, which you probably know better than I do, about how many of those in broadcasting take positions on certain issues, such as how they have voted in the McGovern-Nixon race. The polls attempt to prove that certain broadcasts are unalterably left-wing, and therefore we cannot leave them to their own devices because they will absolutely tilt the news against conservatives.

Mr. **Small**. I am not familiar with that poll, but I have seen many polls. There are statistics, and statisticians, and you can make numbers look in any direction you like. If there is any bias, at least on the network level and every local station of the size that

I know of, there is a bias toward a central position. There is a long history, as I say in my statement, of dedication to balance regardless of what is in the statute, feeling that the integrity, and more important the credibility, of a news organization relies on its audience understanding that it wants to present all sides of the issue.

The same arguments that earlier witnesses have testified to here have been made by philosophers of the left. Your radicals, your liberals, say that they are shortchanged. As the man in the street says, someone must be doing something right.

The CHAIRMAN. Indeed, that is where the opposition comes from. I do not want to say "radicals," but they are coming from liberals and conservatives at the farther ends of the spectrum. That is the strongest opposition. The broad center seems to support this bill.

Now, what is it that you are doing that frightens, unjustifiably or justifiably, both wings? Do they think you do not give them enough time? Do they think somehow they are not being treated fairly because they do not get on enough?

Mr. SMALL. True believers feel they never get on enough. They do not see enough of their arguments in print; they do not see it on television; they do not hear it on radio.

The CHAIRMAN. That is fair enough. Mr. Irvine of Accuracy in Media testified last week. He was complaining about the Washington Post. He said that they would not print enough of his letters or his comments. So, I guess you are right that it is not limited——

Mr. SMALL. Having been his penpal over a number of years, he sure writes a lot of them.

The CHAIRMAN. Well, maybe you go on the theory that if you write 100, 5 ought to get printed, not unlike the theory of selling insurance. I guess if you contact enough people, you will sell some policies.

Gentlemen, I have no more questions. As we are approaching the end of these hearings, it is very clear that the arguments really boil down to just two or three arguments. Is there scarcity or not? Is there or is there not scarcity in cable? I think there clearly is not. Are you going to say that over-the-air broadcasting is scarce because you cannot have 900 million stations instead of 9,000 stations?

If that is the argument, then as Professor Powe said, everything is scarce. Everybody cannot get into this room to hear these hearings, and if we broadcast them we will not be able to broadcast them where everybody can hear them.

Mr. SMALL. I think, Senator, there is one other aspect of that. That is, the assumption that even if there is a limited number—there are 1,800 daily newspapers, 9,000 broadcast entities, low-power television will bring us hundreds more—the beginnings, as my colleague here indicates, of new kinds of transmission of information and home retrieval systems such as he has and they will be common perhaps in the next decade. The other area in which there is no scarcity is the knowledge of how to at least attempt to manipulate the media.

We see a great sophistication on the left, on the right, in the center of all kinds of groups. Senator Pressler referred to a group, I believe it is a group of mothers that have banded together to try to end drunken driving, or to minimize it, they have been extremely successful. They have had national attention.

How did that come to be? How did Ralph Nader come to be many years ago, a single man taking on General Motors? The answer is that many groups not only have become more sophisticated on how to get their story told, but can find plenty of advice, lots of it free, on how to do it, and they are successful.

We do not lack a diversity of viewpoints being aired or printed in this country. There is more of that than ever existed before in our history, and probably than anywhere else in the world.

The CHAIRMAN. Long ago we passed the threshold of sufficient diversity. You cannot digest all of the information there is. There is no possibility you can keep up. And it is only going to expand and broaden and expand and broaden a dozen times over.

Gentlemen, thank you very much. I appreciate your time.

Next we will take G. Jeffrey Gillis, the director of communications for the mayor's office in Milwaukee, Wis., and Ms. Susan Kokinda, representing the LaRouche campaign.

Mr. Gillis, do you want to go ahead.

STATEMENTS OF G. JEFFREY GILLIS, DIRECTOR OF COMMUNICATIONS, MAYOR'S OFFICE, MILWAUKEE, WIS.; AND SUSAN KOKINDA, WASHINGTON REPRESENTATIVE, THE LAROUCHE CAMPAIGN

Mr. GILLIS. It seems I have the most unenviable position of being the first speaker opposed at these hearings, but it does not weaken my resolve.

Mr. Chairman, I am G. Jeffrey Gillis, director of communications for the Honorable Henry W. Maier, who has served as mayor of Milwaukee for the last 24 years.

My testimony today is opposed to those who wish unto themselves the legal right to monopolize the airwaves. We support the Fairness Doctrine because it alone stands in their way.

In these times of highly sophisticated broadcast technology, it is frightening that under the guise of free speech those who own, operate and control the medium would relegate free speech only to their opinions over the public airwaves.

Clearly, free speech and fairness in broadcasting will have no substantive meaning if only private, vested interests are permitted to present one-sided views to the public. Without the Fairness Doctrine, and strong enforcement of it, how will democracy function if the most pervasive method of communication in the 20th century is allowed to become a dictator presenting one-sided views?

Even now, without the repeal of the Fairness Doctrine, one shudders to think of what is happening in the broadcast medium, particularly after the mayor's recent experience. In recent years, the FCC has acted more like defense counsel for broadcasters than defenders of the public interest. By its virtual abandonment of the Fairness Doctrine, the FCC has in fact become the fox guarding the geese.

The facts I will present constitute a horror story, but they are only a prelude to what can be expected if Congress repeals the Fairness Doctrine.

The case history involves Mayor Henry W. Maier and WTMJ, Inc. WTMJ is the broadcast arm of the Milwaukee Journal Corp., which also publishes Milwaukee's only two daily newspapers. WTMJ is licensed to operate three broadcast facilities—WTMJ TV, WTMJ Radio and WKTI-FM. In substance, the Milwaukee Journal Corp. controls a major portion of the public airwaves and a lot of ink. As an article in the October 1981 Washington Journalism Review pointed out, the Journal Corp. enjoys a virtual media monopoly in our city.

In the spring of 1981, WTMJ broadcast, on each of its three facilities, 15 editorial attacks involving the mayor, his administration and the city. These attacks charged mismanagement of the city's garbage collection system and alleged deals with officials of the police, firefighter, and sanitation unions.

The editorials were broadcast on 105 separate occasions—let me repeat that—105 separate occasions, spanning 26 days in a 3-month period. They were petulant, accusatory and damaging.

No real effort was made by WTMJ to present or actively seek out contrasting viewpoints as the doctrine requires. In fact, when the president of the Sanitation Union tried to purchase time to answer charges and give the public another view, WTMJ denied his request. During the same period, WTMJ ignored complaints by the mayor's office that the editorials misrepresented the facts and were grossly unfair.

Following FCC procedures, the mayor attempted to conciliate the matter. He asked for time to respond. His appeal to WTMJ management was ignored.

It was obvious that WTMJ officials were banking on the FCC to act as their advocate, rather than conciliating under the doctrine. It is no wonder, because at that very time the FCC's Chairman was publicly advocating repeal of the doctrine and FCC staff was operating as though it had been repealed. At every step of the way, the FCC staff has, at taxpayers' expense, served as an advocate for WTMJ, a private vested interest.

We urge you not only to retain the Fairness Doctrine, but to strengthen it. Otherwise, what is to prevent multimillion-dollar media monopolies, like the Journal Corp., from completely controlling what the public reads, sees, and hears?

Last week Ed Hinshaw, manager of public affairs for WTMJ-TV, testified that it was costly to his station and the taxpayers to deal with a fairness doctrine complaint filed by the mayor. WTMJ complained that legal fees to fight the mayor's case cost them $17,000. There would certainly have been no cost to them if they would have seen to it that an opposing voice to the editorials, which ran 105 times, was heard.

It is obvious that a broadcaster, whose parent corporation receives more income than the city of Milwaukee collects from its main source of revenue, the property tax, and whose net profit runs well into the millions, certainly finds it no hardship to spend $17,000 on an attempt to obtain unbridled license to attack without restraint.

The facts of this case point to a pressing need for a congressional mandate to the FCC.

In his research, our attorney could not find this manner of abuse of the fairness doctrine anywhere in the reported annals of the FCC.

I would like to thank the chairman and members of the committee. Further, we appreciate the opportunity to present the mayor's essential case against WTMJ, something the Milwaukee public has never had an opportunity to hear, see, or read from the source stations or its related press.

[The following information was subsequently received for the record:]

The following is of Ed Hinshaw, manager of Public Affairs, WTMJ, Inc., in response to the remarks made to the Senate Commerce Committee by G. Jeffrey Gillis, Director of Communications for Milwaukee Mayor Henry Maier. We submit this information only to keep the record accurate.

An examination of the record will demonstrate that the Mayor never has asked us for response time. His first communication in this dispute, addressed to Michael McCormick, President of WTMJ, Inc., simply informed us of the Mayor's intent to file a complaint with the Federal Communications Commission. The letter did not ask for an opportunity to respond to our editorials. The first indication of the Mayor's desire was contained in his complaint to the FCC, in which the Mayor asked for a thirty minute, unedited, response at a time of his choosing. Such a request has not been made directly to us. As the FCC found at all complete stages of this dispute, we used several techniques to alert him of his opportunity to do replies to our editorials, which customarily are aired in the same time and place as our editorials. In fact, we broadcast two editorials offering the Mayor the opportunity to respond "in this time and place." We continue to invite responses to our editorials in the same time and format used by us. The record of this case contains clear demonstrations that the Mayor was alert to his opportunities, but chose not to use them.

The CHAIRMAN. Thank you, sir.

Ms. Kokinda, are you still around here, Susan? I have seen you in the hallways.

Ms. KOKINDA. I am.

The CHAIRMAN. You used to interview me all the time, and then you disappeared.

Ms. KOKINDA. This is a more efficient way.

I am glad to be here representing the LaRouche campaign. We feel that the enactment of the legislation S. 1917 has major and dangerous implications for the political process in the United States. It has to be said that the major east coast networks are both monopolistic in terms of their impact on the political process in the United States, the national political process, and have an identifiable political bias.

I think the American population's reaction to the media's handling of the recent Grenada situation is only the freshest example of the fact that most Americans feel the major networks are biased in their political orientation. I think the experience our campaign has had and our previous campaigns have had with the major network media bears that out.

The LaRouche campaign is certainly controversial. It is certainly a maverick campaign. Mr. LaRouche is running as a Democratic candidate against the wishes of the Democratic National Committee. There is no question about that. However, I think it is fair to say that he has a significant and growing political base in the United States.

He achieved the threshold for Federal matching funds before two of the other so-called media sanctified major Democratic candidates. He is running on a base with 2,000 local candidates around the country who are running on his political platform, and are running to bring his ideas to their fellow citizens. One of the major reasons these people are running is precisely because they feel these ideas are not being put forward in the major national media.

Mr. LaRouche was put on the ballot in the State of California last week by the Secretary of State as the ninth Democratic candidate, she cited significant support in the State of California, and cited a serious national campaign as evidence of the growth of his political support in the United States. This is newsworthy. What has been the major media coverage of Mr. LaRouche? Two networks have chosen to black him out completely. The third network, NBC, on January 30 aired a 5-minute alleged news broadcast, which was an editorial slander of Mr. LaRouche.

One of the key aspects of the LaRouche campaign has been our ability to purchase from the networks, under the existing broadcast regulatory scheme, two half-hours of television time to put forward his ideas to the American population. The first was on the need for a national defense mobilization in which he cited in detail the growing Soviet threat and growing aggressiveness.

I might say that that broadcast sparked a tremendous response from viewers. At the end of the broadcast Mr. LaRouche called on people to call the White House and tell them they supported a national defense mobilization. The White House comment line was busy for 3 hours following that, and calls were still going in several days later, according to the operators at the White House.

He aired a second broadcast last Saturday on the need for an international financial reorganization and warned of the danger of an international debt crisis collapsing the paper-thin recovery in the United States. A similar response from Americans was found.

The overwhelming response we get from people when he goes on television is, where has this man been? Why have I heard nothing about this man and his ideas?

A more intriguing response comes from many of our foreign friends here in Washington, who say: I thought this was a democracy. Why could he go on television for a half-hour, lay out what he laid out, then not have not one whit of coverage except for a snide article in the New York Times the next morning retelling old slanders? I think we have a clear political bias in this situation.

I want to focus for a moment on the NBC situation and on the hatchet job they did on the evening of January 30. We will be pursuing the role NBC has been playing through the courts. In fact, Mr. LaRouche has challenged Thornton Bradshaw of NBC to debate, charging that he is using NBC and NBC News as a political outlet, and if he is willing to do so we would be perfectly happy to debate him.

NBC in its editorial slander on January 30 used only the reports of two reporters whose previous journalistic activity had been writing for High Times Magazine. High Times, of course, is the magazine of the dope lobby. The charge that we are violently anti-Semitic and cult-ridden came from these two gentlemen, with no opposing opinion and no effort to put forward any kind of counterargument or any explanation for the growth of Mr. LaRouche's support in the United States.

We have also circulated a 1 million run leaflet in the United States on NBC, which I would like to submit for the record.

In closing, I would like to say that there is no question that the major—the three major networks exercise enormous influence over the political process. I think the case of our campaign indicates clear political bias, and the passage of S. 1917 would be a clear disservice to the Nation.

[The statement follows:]

Statement of Susan J. Kokinda

The proposed law, S.1917, euphemistically called the "Freedom of Expression Act of 1983", is a disservice to this nation's political process. While the bill is cloaked in the mantle of free speech, the deregulation of the electronic media would actually impair the First Amendment rights of the general public as well as various candidates for public office. In fact, the minimal regulatory scheme of Section 315 in particular needs further strengthening from the Congress and the Federal Communications Commission.

As the United States Supreme Court recognized in the seminal First Amendment case of *Red Lion* v. *F.C.C.*, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount" and "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether by the Government itself or a private licensee." The Court recognized the reality that the major networks monopolize and control the public airwaves to such an extent that minimal rights of access must be upheld in order to preserve the First Amendment rights of the general public.

Section 2 of the bill urges Congress to find "There no longer is a scarcity of outlets for electronic communications." This proposed finding of "no scarcity" is a myth cultivated by broadcasters and is, unfortunately, subscribed to by the present Chairman of the Federal Communications Commission. While the cable television industry has grown over the past several years, it is clear the New York-based major networks retain their monopolistic dominance over the industry and will continue to do so for many years to come.

The control exerted by the Manhattan-based major networks can and does lead to the actual suppression of important political and social viewpoints which are not approved of by the network hierarchy, and the East Coast financial interests they represent. S.1917 basically proposes to do away with any right which the proponents of such viewpoints might use to gain a minimal access to the public airwaves. The deregulation of broadcasting is decidedly not "the most effective protection for the right of the public to receive suitable access to a variety of ideas and experiences" as the case of Lyndon H. LaRouche, Jr., a 1984 candidate for the Democratic presidential nomination amply demonstrates.

Lyndon H. LaRouche is an internationally known economist and politician who is probably the most controversial figure on the American political scene. Even his political enemies grudgingly recognize the significance of LaRouche's political constituency as attested to by Peter Spiro in the February 6, 1984 edition of the New Republic. While the Spiro piece is a collection of shopworn libels, the author does concede the political power of LaRouche's political machine:

"During his last two Presidential candidacies, LaRouche bought several half-hours of prime-time network television; he started off this campaign with a $210,000 Saturday night slot on CBS on January 21. As his political arm, the National Democratic Policy Committee ran over five hundred candidates for municipal and state offices in 1983. It has captured seats on several local Democratic committees, and has polled as much as 30 percent in Democratic Congressional primaries. On more than seventy-five occasions, representatives from LaRouche's various affiliate organizations have testified before Congressional committees on subjects as varied as the Panama Canal treaties, the Global 200 report, the defense budget, and the confirmation of such officials as Cyrus Vance and Andrew Young (against), and James Watt and Anne Gorsuch (in favor)."

In short, Mr. LaRouche is a political leader with a significant base of financial and electoral support. He has become extremely popular and well-received on radio talk shows throughout the heartland of America.

Despite the obvious newsworthiness of Mr. LaRouche's policies and his political campaign, two of the three major television networks have deliberately and totally blacked out his campaign from their newscasts. The third network, NBC, has chosen to produce at least two defamatory broadcasts about Mr. LaRouche's political activities and presidential campaign. As opposed to the broadcasting Fantasyland envisioned by S. 1917, a case study of the NBC situation reveals how politically-biased network television really functions and why the present laws are minimally necessary.

In October, 1983, Mr. LaRouche's presidential campaign staff was alerted to a plan by NBC's First Camera newsmagazine to produce a program attacking the LaRouche presidential bid. The staff contacted NBC, and confirmed that such a program was indeed planned. The First Camera production team asked for cooperation in preparing the program. Since a previous LaRouche interview with NBC had been totally chopped to bits for purposes of distortion on a previous broadcast, Mr. LaRouche and his staff sought certain guarantees of fairness from the First Camera producer, Pat Lynch.

Ms. Lynch would not accede to any guarantees of fairness, except to pledge her journalistic integrity as a promise of even-handed treatment. Ms. Lynch informed the LaRouche staff that her program would be a fair presentation of Mr. LaRouche's candidacy and political activity. In this regard, she assertedly distinguished herself from her NBC cohort, Brian Ross, who was working on a piece about LaRouche for NBC Nightly News. Ms Lynch referred to the prospective Ross piece as a "political hatchet job."

However, it soon became clear that no substantive presentation of Mr. LaRouche's policies or campaign would be permitted on First Camera. Mr. LaRouche therefore declined to grant the proposed interview and once that decision was made and communicated to NBC, the real purpose of the First Camera program was rapidly unveiled. Both Lynch and Ross traveled extensively in this country and Europe to harass Larouche supporters. Millions of dollars was spent to obtain defamatory material on LaRouche and his supporters, much of which was obtained from notoriously unreliable and discredited sources. The First Camera team finally admitted that Lynch and Ross were working in tandem, that Ross's program, which appeared on the January 30 NBC Nightly News, was a mere "teaser" for the to-be-aired First Camera presentation, and that the actual purpose of the program was to destroy LaRouche's presidential campaign. To this end, the "fair" and "independent" producers and reporters at NBC have admitted their collaboration with the FBI, New York District Attorney Robert Morgenthau, and James Jesus Angleton, formerly with the CIA, in producing the political attack on the LaRouche campaign.

Further investigation by the LaRouche staff discovered that Lynch, Ross, and others were also using material from subversive drug lobby sources like Dennis King and Chip Berlet. King and Berlet are affiliated with the National Lawyers Guild, an organization whose loyalty to the United States is certainly questionable, and High Times Magazine, one of the leading proponents of the legalization of drugs in this country. The information which King and Berlet peddled to NBC has already been declared libelous by various European courts of competent jurisdiction. NBC is fully aware of the libelous nature of the King and Berlet "information" and is fully aware of their drug lobby pedigrees, but as of this moment still intends to proceed anyway with its First Camera broadcast.

Mr. LaRouche is quite knowledgeable about his legal rights and knows a libel suit against NBC is an appropriate legal vehicle to rectify any damage done to his reputation. He fully intends to pursue this remedy. But political campaigns are short-lived phenomena and libel suits, even successful ones, usually take years of courtroom battles. For the candidate, a libel suit is no remedy for immediate damage done to his campaign.

Under the present regulatory scheme, however, a candidate has certain opportunities to set the record straight through various fairness doctrine complaints and by reasonable access guarantees. The present Federal Communications Act statutory and regulatory provisions protect, to some extent, the integrity of the election process against politically-biased network manipulation. The ultimate beneficiary, as envisioned by previous Congresses and the U.S. Supreme Court, is the average citizen who is provided with information from all sides of a political controversy.

S. 1917 is a bill based upon a political fantasy. The major networks do not evaluate their newscasts and interview shows according to some abstract standard of "newsworthiness". Their criteria are political, not journalistic, as the case study of Lyndon LaRouche demonstrates. The sponsors of this bill should wake up to the realities of American journalistic and political life. The First Amendment rights and interests of all concerned are better protected by the present system than the proposed deregulation nostrums of S. 1917.

The **Chairman**. Do you think there is a conspiracy amongst them?

Ms. **Kokinda**. I think they have very clear political bias.

The **Chairman**. They all have the same biases?

Ms. **Kokinda**. I think they certainly agree with one thing in common: They do not like our policies and they do not like our viewpoints.

The **Chairman**. Do you have the same problem with local stations, too?

Ms. **Kokinda**. To a much less degree, although there is a similar problem.

I would like to make one point in terms of the print media. We have similar problems with the print media on the national level. The New York Times, the Washington Post have seldom said anything which I would consider objective about our organization. However, we have the possibility and we do run a very successful print media capability of our own. We have several magazines. We have a newspaper, and we have a growing readership of that.

We have access. We have the ability to do something about that. We do not have the ability to counter ABC, NBC, and CBS, and I do not think anybody does. That is why I think regulation is absolutely necessary.

The **Chairman**. I am curious. You have different print outlets, which normally, for equivalency, cost more than broadcast outlets. Why have you not bought any radio or television stations?

Ms. **Kokinda**. On the financial basis, that is not necessarily the case. In terms of our own financial situation, our ability to produce this print media is based on very dedicated staff commitment at, I would probably submit, very low salaries. It is not quite comparable to the ability to purchase a radio or television outlet.

The **Chairman**. Let me read you a statement that Ford Rowan made last week about the Fairness Doctrine and the political broadcast rules:

> The rules have been rigged to favor the powerful incumbent politicians retain their newsworthy advantage and stations need not cover fringe candidates on the news, and taken together Congress has fashioned the equal time, fairness, reasonable access and lowest unit charge provisions to prctect the Members of Congress themselves. '

Do you think that is true or not?

Ms. **Kokinda**. I do not think it is true from the standpoint of necessarily protecting members of Congress or incumbent politicians. I do not think that is the problem. I think the problem is a particular political bias in the media, which is manifest no matter——

The **Chairman**. Do you find the same to be true, to a lesser degree, with local broadcasters? Do you find it true with newspapers?

Ms. **Kokinda**. To a lesser degree I think that is also the case. The major thing that needs to be addressed at this point is the impact of the major network media on the political process. I think that is inescapable.

The **Chairman**. What about the impact of local radio or television on the political process?

Ms. **Kokinda**. It has an impact. Using us as a case study, we have over the recent immediate period, have had much greater access to local radio, to a lesser degree television, but certain access to the television stations.

One of the reasons, as I say, we are running the citizen candidate movement around the country is to take advantage of the fact that there still is much more access on that level.

The Chairman. Mr. Gillis, how long has Mr. Maier been mayor?

Mr. Gillis. Twenty-four years.

The Chairman. Despite the opposition of this media oligopoly he has survived 24 years?

Mr. Gillis. That is correct.

The Chairman. How?

Mr. Gillis. Basically, by communicating with the people, personally communicating with the people, speaking engagements and so forth throughout the community. Also, I might add that the mayor has, in terms of policies, done a great deal for the city of Milwaukee, something which you can see just by walking down the streets.

The Chairman. Do all the other television stations treat him the same way?

Mr. Gillis. No. I think it is important to point out, Senator, that in 23 years the mayor has never made a request similar to this to a particular station for a time to respond.

The Chairman. How many television stations are there in Milwaukee?

Mr. Gillis. You have the three network affiliates, ABC, CBS, and NBC. You have Select TV, of course. And then you have the Metromedia channel and then public television.

The Chairman. And you have a religious station and a minority language station?

Mr. Gillis. That is recently. Then you have got Channel 55 out of Chicago, which also reaches Milwaukee in terms of minority language programing.

The Chairman. You have about 30 radio stations on the rate card of your market?

Mr. Gillis. That is right.

The Chairman. How do they treat the mayor? Fairly?

Mr. Gillis. I think what you have to understand to answer that question is to put it in the context of the corporation structure in Milwaukee. What you have is the Milwaukee Journal Corp., which controls a great many news outlets.

We listened to some people testify earlier that so many of the radio stations rip and read the news. I think that is the case in Milwaukee. I think a great number of the radio stations there take what they read over the air right out of the newspapers in the morning or the afternoon.

In terms of overall fairness in treatment, I would say that by the other stations, the other electronic media, the mayor is treated relatively fairly. Even in the news department of WTMJ, the mayor has been in recent years, in the last 1 or 2 years, treated fairly.

What we are dealing with here is a case in point, an example of what a broadcaster can do to a political official, such as yourself or any other little political official which may reside in any city throughout the United States. That is, day after day, hit, hit, hit, without the broadcaster offering any opportunity for a contrasting view to be aired for those viewers of that particular station.

Clearly, there are other TV stations and they may have other views. But when you have such a pervasive—I will define that word if anybody wants me to define it—a pervasive influence, as the Milwaukee Journal Corp. has, I think it is quite difficult to be able to combat that on a day-to-day basis.

The **Chairman**. How many daily newspapers does Milwaukee have?

Mr. **Gillis**. Two.

The **Chairman**. They are owned by the same outfit?

Mr. **Gillis**. That is correct.

The **Chairman**. Should they be subject to the same reply doctrine as television is if they are hitting the mayor day after day in print editorials?

Mr. **Gillis**. I think what we are talking about here is somewhat different. I will not address the scarcity issue. I understand it has been addressed at great length.

Newspapers are privately owned. I believe that broadcasters are trustees of the public airwaves. I think that there is no inhibition at all for a broadcaster to initiate a controversy or for a broadcaster to want to develop an issue in any way, shape or form. The FCC will not enforce the Fairness Doctrine anyway. It is just a gentle reminder that it exists. They can come on the air, they can hit on a controversial issue. That is not the question.

The question is what responsibility do broadcasters have in keeping the public informed of the other side of the issue? In this particular instance, they ignored the complaints of the mayor's office, they refused to sell time to local sanitation union officials who were being more or less attacked, and we got absolutely nowhere with them. That is why the Fairness Doctrine is needed.

The **Chairman**. Question: Should the same standards apply to cable that apply to over the air broadcasting. Cable is not a scarce commodity. You can have as many cables as you want.

Mr. **Gillis**. We do not have a cable system at the present time. I do not wish really to go into the reasons why, but we all know that Warner-Amex has had some problems.

The **Chairman**. Has the city council granted a franchise yet?

Mr. **Gillis**. Yes, sir, they have and we have public access provisions. And I think the public access provisions are warranted. You get into the same bag you do with other broadcasters. I mean, do you want to leave the decision of whether or not the public is informed up to a broadcaster or would you like to have a gentle reminder of the Fairness Doctrine there to hopefully persuade them, if you will, to present both sides of the story?

We are not even talking about a balance of 50-50. We are just talking about getting an opposing view heard, an alternative view.

The **Chairman**. But you are espousing the theory that all radio and television stations ought to have that obligation. You will not be satisfied to have diversity among them. Every one of them has to have divers programing.

Mr. **Gillis**. I think that is correct, because I think all the various electronic media outlets have their own viewership, depending on what they run before the 6 o'clock news and what they run after it, and it is pretty well solid.

What we are talking about is a unique situation in our particular environment. I think that is why Mayor Maier wanted me to come and testify. We are not talking about diversity of opinions. We are talking about a corporate structure which controls a sizable number of the communications media. I understand that in 1981 the Journal Corp. applied for a low level television license in Milwaukee, where they already have a facility.

Clearly, it is very difficult to be able to function, not that they are biased against the mayor on a day-to-day basis, but if they pick up the party line, if you will, it is almost impossible to deal with.

The CHAIRMAN. I take my hat off to the mayor. Against this combine he has been successful for 24 years. He must be an extraordinary man and he must somehow be reaching the public around the news media. Give him my best.

Mr. GILLIS. I certainly will, Senator.

The CHAIRMAN. Thank you for coming.

Susan, thank you.

Ms. KOKINDA. Thank you.

The CHAIRMAN. Now we will take Mr. Larry Gold, representing the AFL-CIO, and Ms. Doris Aiken.

STATEMENTS OF: LAURENCE GOLD, SPECIAL COUNSEL, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; AND DORIS AIKEN, PRESIDENT, RID-USA, INC.

Mr. GOLD. The AFL-CIO opposes enactment of S. 1917 for the reasons stated in its prepared statement.

The CHAIRMAN. That statement will be put in the record, as will all of the others. I might say to the audience that I have worked with Larry before. He is one of the best lawyers I have run across in this field, in Washington or around the country.

Is it your contention that the media tilts to the right, or tilts conservative, when it airs issues involving strikes or workers' rights?

Mr. GOLD. I do not think right and left are as much help in this area as in others. People who own the media are employers. They do not forget that status, by and large, in presenting labor disputes. And it is not a realistic option for unions to become station owners and employers, too. So there is a different bias at work here, and it is one that runs throughout the society. The Washington Post is considered liberal. Do not tell that to the printers union.

The CHAIRMAN. I remember that situation.

But the reason I asked that question is because many of my very conservative friends are convinced the newspapers are anti-business. Yet, you are saying that on business issues, at least so far as they involve unions, the newspapers tilt toward the business side. Somehow the papers seem to be making everyone unhappy. Everyone thinks they are unfair.

Mr. GOLD. I think that is true, and I think it is one of the difficulties in sorting out this area. I was listening to the testimony just before mine and I was thinking of this point in listening to the witness for Lyndon LaRouche. I am really not comfortable in putting the argument over the fairness doctrine on whether or not the press is biased. The broadcast media, like every other aspect of society, is run by human beings who are fallible, and a system of checks and balances that recognizes that, just as we have recognized it in setting up our governmental structure, makes a lot of sense.

The only argument I see of any substance on the other side is an argument concerning self-censorship. It seems to us that that argument just is one which does not prove out. For somebody who has the right to use this valuable resource, which you can only use with a governmental license, to complain that one of the costs is foregoing certain profits by giving someone else a chance to speak seems to me to be a rather craven response.

The CHAIRMAN. I might say, Larry, that profitability is not an issue I have heard about very often, even from opponents or this legislation. I have not heard many people say that the reason to get rid of the Fairness Doctrine is so that a station can maximize its profits. I find that it us more of an editorial issue should broadcast be allowed to be like print? But I do not think that profits per se are much of a factor.

Mr. GOLD. My point is, Senator, there are two different arguments concerning self-censorship by licensees faced with the fairness doctrine. One would be a question of ego: "I do not have to do that, I do not want to have someone else tell me what I have to say."

The second is that, it is either impossible to carry on this business, or carry it on in an orderly way, if I have to permit people to reply. We find both of those arguments to be unsatisfactory where the end sought is giving a licensee an unbridled discretion.

I wish to take up as well the point you raised with one of the last panelists; namely, should the same rules apply to the print media. Our view is that the same rules ought to apply; if there is to be a codification of the first amendment law, that the *Red Lion* rule is righter than the *Tornillo* rule. We took that position in the Supreme Court and I continue to believe we were right.

The CHAIRMAN. Larry, I want to make sure I understand what you are saying. All things being equal, if we were starting from scratch, you would not have the first amendment as we now have it? You would have the print media subject to roughly the same restrictions as the electronic media?

Mr. GOLD. Until *Tornillo,* no one knew what the first amendment said with regard to the right of access to the print media. As we said in the statement, the historic first amendment cases have been whether you limit what someone can say in consideration of other interests: the right to reputation, national security, and such other considerations.

Tornillo raises, as *Red Lion* does and as S. 1917 does, the question of what kind of balance do you strike where you are deciding whether to limit a media owner's rights in favor of someone else's right to speak. That is a different issue, because one way or another, putting aside self-censorship, you are into the area of who will speak, rather than diminishing the total amount of speech that you will have.

The CHAIRMAN. Let me ask you what this portion of your statement means.

> Putting the foregoing to one side, and at the risk of being heretical, if one were required to choose between the first amendment rules governing the broadcast media as stated in *Red Lion* and the rules governing the print media as stated in *Tornillo*, the proper choice would be to apply *Red Lion* not *Tornillo* across the board.

In essense, you are saying you agree with the decision of the Florida Supreme Court in *Tornillo?*

Mr. **Gold**. Correct. It goes back to our evaluation of the costs entailed. Insofar as the press says that there should be limited access, it seems to me the argument comes down to, A, "If we cannot play with our plaything the way we want to, we are not going to play," or B, "That the costs imposed on us in permitting access makes it impossible for us to exercise our right of free speech in a vigorous and effective way."

The **Chairman**. Let me ask you what has changed since the first amendment was adopted. The Founders grasped what they were doing. At that time, there were only eight daily newspapers in this country. That was a real scarcity, yet they consciously said the Government cannot touch those papers. What has changed from then to now that should cause a change in that philosophy?

Mr. **Gold**. You may be absolutely right on this, and I may be dead wrong but I do not agree with your premise. I do not think that the first amendment says that if you are running a newspaper, the Government cannot say that you will devote at fair cost a certain portion of your newspaper to printing contrasting views.

That is what *Tornillo* says the first amendment means, but it is not the only view, and it is our sense that, particularly now, given the nature of the differences between being read in the New York Times or the Chicago Tribune or the San Francisco Examiner or whatever and having the right to picket or leaflet is just different in kind, and that access rules, unless they really do impose unacceptable costs—and we do not believe they do—enhance free speech rather than limit it.

The **Chairman**. Again, I want to make absolutely sure what you mean, Larry. First, you agree with the Florida Supreme Court on *Tornillo.* Second, you think that even with the first amendment as written, that does not prohibit the Government from imposing some equivalent of the fairness doctrine on newspapers.

Mr. **Gold**. Indeed.

The **Chairman**. And if by chance the law does not permit that, the law should permit it?

Mr. **Gold**. Yes. The clothing workers' union brought the antecedent of the *Tornillo* case against the Chicago Tribune when the Chicago Tribune had reported a strike extensively in a way which was very harmful to the union, and the union sought to buy an ad. The Tribune said, "we do not permit people to take out those kinds of ads." The union sued, and lost in the seventh circuit. *Tornillo* also happens to be the president of the Florida Teachers' Union.

The **Chairman**. That is the same one who was attacked by the Herald? I was not aware of that.

Mr. **Gold**. So our position on this issue—which I think is a difficult issue, and I do not say that the Supreme Court is plainly wrong on it, I just say that there is a strong argument the other way,—is that this is a question that has to be answered from the language and the tradition and the theory of the first amendment, and we think the Supreme Court erred, and would have been better advised to have followed the theory of *Red Lion.*

In light of this dialog,—which has been much more of a pleasure than reading the statement—and since the statement goes in the record, I would like to turn over the rest of the time to my colleague on this panel.

The CHAIRMAN. Larry, as usual, your logic is flawless. However, I think your premise is cockeyed and false.

Mr. GOLD. That is not the only time that has been true.

[The statement follows:]

STATEMENT OF LAURENCE GOLD, SPECIAL COUNSEL, AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) opposes enactment of S. 1917. That opposition is based first and foremost on hard practical experience. Over the years trade unions have found that the fairness doctrine, though feeble, is the best hope of assuring that commercial television and radio stations air labor's side on controversial issues of the day, most particularly collective bargaining disputes and other matters concerning workers' rights. Nothing in our experience supports the pious belief that absent the possibility of such legal redress organized labor's position on the issues will be regularly heard on those stations. Though unions have no license to speak for other groups that do not have access to medid boardrooms, it is safe to say that those groups will suffer equally under the regime envisioned by S. 1917. The resultant loss for listeners and viewers, we submit, is out of all proportion to any hoped-for gains.

While our opposition to the repeal of the protective provisions of the Federal Communications Act is eminently practical, it is also well grounded in free speech doctrine. The basic argument for the bill, as we understand it, is that broadcasters are being denied "true free speech", that this denial is based on the false premise of a scarcity of broadcast frequencies, that the result of the present legal rules is a debilitating self censorship by broadcast licensees and that the cure is to guarantee broadcasters a complete autonomy. Each aspect of this argument is in our judgment fatally flawed.

There is, and for some time has been, a large measure of agreement that under our constitutional system, "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison,* 1 Cranch 137, 177. The fairness and equal opportunity doctrines have been challenged under the First Amendment in the courts and have been upheld as constitutional. *E.g., Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367. On that litmus test broadcasters are accorded true free speech.

It is true, of course, that the resulting First Amendment rules are not the same as those that govern the print media. Compare *Red Lion, supra* with *Miami Herald* v. *Tornillo,* 418 U.S. 241. Those differences do not however justify the approach of S. 1917. The critical point true today and from the beginning is that applicants compete for many broadcast frequencies, that the Government selects a licensee from the competitors and that the Government in the interest of permitting coherent communication on that frequency then bars all but the Government-selected licensee from using that frequency. Broadast licensees are strangely silent on the origins of their rights in arguing for the freedom to employ their Government monopoly to silence others. The reason for that silence is that this unique circumstance, as the Supreme Court has held, justifies unique rules:

"Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves.

"[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves. [*Red Lion, supra,* 395 U.S. at 388–89.]"

Putting the foregoing to one side, and at the risk of being heretical, if one were required to chosc between the First Amendment rules governing the broadcast media as stated in *Red Lion* and the rules governing the print media as stated in *Tornillo, supra,* the proper choice would be to apply *Red Lion,* not *Tornillo,* across the board. Traditionally, First Amendment cases have concerned attempts to limit speech in order to protect non-speech interests, e.g., national security, good reputation or privacy. But *Red Lion* and *Tornillo* concern attempts to limit the rights of owners of an established means of communication in order to enhance the rights of third persons to speak. That very different contest between competing First Amendment rights justifies limitations on a broadcast licensee or a newspaper owner that would not be justified where the Government's purpose is to limit speech by regulating the conduct of a licensee or owner. For the "[First] Amendment rests on the assumption that the widest possible dissemination of the information from diverse and antagonistic sources is essential to the welfare of the public. . . . Freedom to publish means freedom for all and not for some." *Associated Press* v. *United States,* 326 U.S. 1, 20. Thus, it is our view that if the First Amendment law developed by the courts is to be perfected by Congress the direction of change should be the exact opposite of S. 1917; Congress should enhance the right of access of non-licensees to the broadcast media rather than enhancing the monopoly rights of licensees. After all in a democratic society the right of free speech is designed to "put[] the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen* v. *California,* 403 U.S. 24.

The broadcaster's claim that the present rules force a defensive selfcensorship echoes with an ugly sound like blackmail. The only "penalty" imposed on broadcasters by the fairness doctrine is to permit persons other than the licensee to be heard perhaps at the cost of some diminution in the licensee's profits. And broadcasting is not a failing industry. Such a "penalty" should not in reason and has not yet in fact had a domonstrably adverse effect on licensee free speech. And if there were such an effect S.1917 is not the proper cure. In this respect again we submit that the *Red Lion* opinion's response is eminently sound:

"[I]f present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition for granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and feeedom of the press. Congress need not stand idly by and permit those lecenses to ignore the problems which beset the people or to exclude from the airwaves anything but their own views of fundamental questions. [*Red Lion,* 395 U.S. at 393–394.]"

There is one final point also touched on in *Red Lion,* that we wish to emphasize. There is little room for dispute that the major commercial broadcasting stations that provide the bulk of "free radio and television programming are unique in the number of Americans those stations reach and their hold on that audience for the forseeable future. For the purpose of debate over how those licensees should be regulated in the public interest, that unique situation makes it irrelevant that communications technology has opened up new, but by no means comparable, means of self-expression:

"[E]xisting broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's efforts to assure that a broadcaster's programming ranges widely enough to serve the public interest. [*Red Lion,* 395 U.S. at 400.]"

The **Chairman**. Ms. Aiken.

Ms. **Aiken**. Yes, sir.

The **Chairman**. Go right ahead.

Ms. **Aiken**. First of all, I want to say that I do not fall into either one of those groups who say they are mostly opposed to your bill, the left or the right. While I am a 20-year member of the ACLU, and have been a member of the governing board of Common Cause in New York, I also find myself arguing with the ACLU all the time on checkpoints and other constitutional rights for people to drive drunk on the roads, and I certainly do not feel—I think we are moving. Intoxicated drivers is a group that is right down the middle and touches a great deal of people, a wide audience, and therefore perhaps some of my comments might have a different validity from your viewpoint.

My name is Doris Aiken. I am president of RID-USA, which means Remove Intoxicated Drivers. I live at 1013 Nott Street, Schenectady, N.Y. I am a member of the National Commission Against Drunk Driving.

I am here to ask the Commerce Committee not to delete or weaken the provisions of the Fairness Doctrine from broadcasting practices and standards. In fact, I think that they should be considerably beefed up, and I think that there should be mandates that time has to be given under certain circumstances. And I think that every network TV station should have to have a public service announcement describing the Fairness Doctrine so anybody who watches the station knows that it exists, because most of us do not know that it exists. One axion which has been saved from being a myth by the Fairness Doctrine that America is proud of is that everyone has an opportunity to speak up when skewed information or one-sided views are presented on the air.

I just came back from a trip to France, and we had an international conference on drunk driving. Try to get on the 6 o'clock news criticizing President Mitterrand in France, because there is one guy sitting there reading the government news on every channel. One thing the French really admired is the Fairness Doctrine, and they keep referring to it, and they think of it as much like the Statue of Liberty, as a wonderful contribution to the Western World. Coming from that environment, I have to say that my patriotism is glowing a little bit.

I think it is very important to enhance the Fairness Doctrine for everyone to understand it. I speak from experience inside the industry, where I produced and hosted public affairs shows for 4 years for WRGB-TV. That is a General Electric flagship station in upstate New York. The comment that the networks are antagonistic to business is nonsense. General Electric is a business. Networks are a business. They are in business to make money, and their rating are a chief concern of the upper levels of all the networks. They are not antibusiness at all. Very frequently it is the other way around.

On the other side, I speak from the viewpoint of a person trying to get on the national media. I speak for thousands of volunteers. RID is the only 100-percent volunteer organization working on this issue. We are the only one that takes no money from the alcohol industry, and we are the only one—we launched the drunk driving revolution in 1978 successfully. In 1980 fatalities dropped 10 percent in the State of New York where we started. Other States look to New York when they pass their drunk driving legislation, but we cannot get on the network to tell our story. It is regarded as too controversial.

While RID has tried to get the attention of the major networks to tell the public what deters drunk driving and how to get local control of a criminal justice system that is not working and how to make it work, we have been systematically, conscientiously denied a presence on the national networks. While program producers always call RID for the latest data, referrals, contacts with victims, with judges, and people who have to come on the networks because the judge said they had to and talk about their crime, the national spokesperson for RID and its founder have been absolutely kept off the air, and usually by some lawyer in the corporate hierarchy who is worried about nuisance lawsuits but is really uncomfortable with RID's viewpoints on lawyers and the criminal justice system and their influence on justice in the court.

We were dropped one time from a "60 Minutes" program after an hour and a half interview because some lawyer back at "60 Minutes" felt that my comments were too controversial, although I was talking about a perfectly normal and absolutely legal situation in the United States where district attorneys give heavy campaign contributions—defense lawyers give heavy campaign contributions to district attorneys. It is perfectly legal. They are logged in. We all know what they are, yet they do not want the public to know that.

The CHAIRMAN. Who gives these contributions to the DA?

Ms. AIKEN. The defense lawyers who operate and who are asking for favors, and the people wonder why district attorneys do not want to prosecute drunk drivers. That information worred 60 Minutes so they dropped the whole thing.

The CHAIRMAN. What is the reason the networks or the local television stations will not put that on?

Ms. AIKEN. They do not want to have nuisance suits from defense lawyers. I know there are many lawyers in this room, many good lawyers. I am looking at one.

The CHAIRMAN. It is not the Fairness Doctrine? They are afraid of a defamation suit?

Ms. AIKEN. Well, I am saying this is what they say outwardly. Inwardly, they do not like our opinions as lawyers. As a group they do not like those opinions.

The CHAIRMAN. I am curious. Are all groups like yours kept off? Are there no antidrunk driving stories or groups on television?

Ms. AIKEN. I am getting to that. How do producers select a spokesperson? That is a very personal thing. Being a producer myself, one of the things that kept me honest was the Fairness Doctrine, because people with highly paid public relations firms behind them would load me with material and give me program ideas and see that their people would be there all expenses paid.

It would be very easy for me to just say, OK, come on. You look like a good guy. I see a video tape of how you are going to come across the TV. You are not going to be tonguetied or faint or anything. So therefore we will put your person on.

If it had not been for the Fairness Doctrine, which my boss explained to me in detail when I first started working there, I would not have possibly thought that the viewing audience was interested in equal rights for fathers organizations, or in the gay rights group. That was not the first thing that came to an audience was gee, my, we are kind of an up straight apple knocking audience up there, but we put these groups on.

I was amazed to find out that the audience was very interested in holistic health, no matter what the highly paid medical people were sending me in the mail. Under the Fairness Doctrine, I got the holistic health people, and we got more telephone calls on that one program than any other public affairs program I put on in the whole 4 years.

So, the producer has a very personal job to do and a hard job, and he is working under time constraints, so they will put on the group that has the backing and has a track record, looks good on television, is attractive, deferential to men, et cetera.

That is a little joke I have just put in there. But anyway I am very deferential to men, especially you, Senator.

But there is no guarantee, and I think there should be one, that under the Fairness Doctrine someone will get time, but at least the producers at ABC who have consistently kept us off their network for 3 years will now have memos in their call files, because finally it dawned on me, I can use the Fairness Doctrine to force ABC to put the RID viewpoint on the air whether they like it or not.

Right after I finish here, I am going over to the FCC Commissioner, and I am going to take all my correspondence and all the time they have given to other organizations.

The CHAIRMAN. Let me ask you a question. Is your complaint that they will not put out information on drunk driving, or that they will not put your organization on?

Ms. AIKEN. They will not put our opinion on. There is no other organization who has been sitting in the courts gathering the information, and we know now why a jury will not convict a drunk driver. That question came up on Ted Koppel's show on "Nightline." I really admire Ted Koppel, and I think "Nightline" is a fantastic program, but he had no background to come back to the judge. He said to the judge, why do you think juries will not convict drunk drivers? The judge said, I do not know, it is a mystery to me.

Well, it is no mystery to RID We know exactly. The rules of evidence put their by lawyer legislators back there in the State capitols and the voir dire processes, you throw everybody that has any reasonable intelligence off the jury when you are having a drunk driving case. You throw off anybody who passed his test. You throw off anybody that knows anything about photography.

The CHAIRMAN. I would bet that if it was not for the Fairness Doctrine, you would get on. I think what they are afraid of is putting you on and then having to put somebody else on in response to the comments you made. I think what you are saying is very newsworthy. I think the Fairness Doctrine is hurting you, not helping you.

Ms. AIKEN. Well, we will see. I know that when I was a producer, it helped. It kept me thinking about the little person out there whose opinion I was not particularly interested in, and I kept thinking, and I did not think my audience was interested in it, but I remember my boss sitting up there telling me, we have a Fairness Doctrine here. Who have you had on here that you really are not interested in lately?

The **Chairman**. Short of the worry about being sued for defamation or libel or slander—that is a problem that both the press and broadcasters face and this bill does not address that—I am willing to wager that broadcasters would find what you have to say rather exiting and put you on television. They are more afraid however, of what they are going to have to put on in response to you, and who they are going to have to give response time to. They just finally say it is not worth it.

Ms. **Aiken**. I think they can put on a panel with F. Lee Bailey and me, and we will have more people tuned into that program than any other network, but they will not do it because they have already selected—producers have knee-jerk reactions. They have a selective spokesperson. They are constantly being provided with information.

We have no funds for a publicist, a public relations person. No producer knows what my schedule is at any one point in time like they do other organizations, so we are being penalized, and I think it is too bad, because we have a viewpoint that I think would save lives, and we are not being allowed to give it on the air, and there is no other organization who can speak for us or who has the standing and the track record to speak for us.

Some decision had been made by the producers that one organization—they tend to label organizations and to lump them together and say, one organization will speak for all. MADD is an activist in the drunk driving movement. We are going to say who that is, and we are going to put that person on. And that is going to sell tickets because this person will become very well known. As soon as the name comes up, people turn on the set. That blocks out the basic viewpoints and opinions of people who are out there and who know what is going on.

I have a sample case history here having to do with ABC which I really admired. I remember after one program three times in 2 weeks this happened to us. We were particularly annoyed because we had spent the holiday getting ready for the Nightline program on drunk driving. Then we were held off the air. I was told not to bother coming down to the station. Then, 2 weeks later, a program on the criminal justice system, we were talking about a drunk driving system, and the sentence of Dan White in San Francisco, comparing the two, how come one guy got a very limited sentence and the jury smiled on him when he walked out of the room, and another person, a drunk driver, was severely punished.

We know the answers to those questions, and to have to sit in my living room and know that millions of people are going to have to take the word of Roy Cohn speaking for the law and order community, a person affiliated with the McCarthy organization not too long ago, is really galling to me, because RID should have been up there. We have the information.

So, now, under the fairness doctrine, we finally got a hearing at a very high level 2 weeks ago which ordinarily we would not have gotten. The two people in the room, one was with a legal background and did not feel we had a case. The other program thought we did have a case, and we were denied time. Now we are taking it to the FCC. I think that we are going to see, is the FCC really prepared to back the mandate that they have. If they are not, then I think we should get another FCC person, but for heaven's sake, do not ditch the program. It is valuable.

[The statement follows:]

Statement of Doris Aiken

My name is Doris Aiken and I am President of RID-USA, INC. (Remove Intoxicated Drivers), headquartered at 1013 Nott Street, Schenectady, N.Y. I am here to ask the Commerce Committee not to delete, or weaken the provisions of the Fairness Doctrine from broadcasting practices, and standards. One axiom (saved from being a myth by the Fairness Doctrine) America is proud of, is that everyone has an opportunity to speak up when skewed information, or one-sided views are presented on the air. Just try getting on the 6 o'clock news in Paris, criticizing President Mitterand. The Fairness Doctrine is a free speech protection for both broadcasters and the public. I speak from experience inside the industry where I produced and hosted public affairs shows for four years for WRGB-TV, the G.E. flagship station and then NBC affiliate. Currently, I speak for the thousands of volunteers, and hundreds of thousands of injured and permanently maimed and killed victims of drunk drivers, and their families.

While RID has tried to get the attention of the major networks to tell the public what deters drunk driving and how to get local control of a criminal justice system that isn't working, and make it work, we have been systematically denied a presence on the national networks. While program producers always call RID for the latest data, referrals, contacts with victims, offenders, judges, the national spokesperson for RID has been kept off the air, usually by some lawyer in the corporate hierarchy, outwardly worried about nuisance law suits, but inwardly uncomfortable with RID's viewpoint on lawyers and their influence on justice in the courts.

THE FAIRNESS DOCTRINE WORKS

Finally, RID had to apply the Fairness Doctrine to get the attention of those high in the network heirarchy, so they would meet with us, and hear our grievance. While there is no guaratee (and perhaps there should be one) it is most unlikely that we will continue to be ignored in the future. The producers at ABC now will have memos in their call files that RID's program ideas and strong recommendations be heard. Without recourse to the Fairness Doctrine, there would have been no conduit for a conversation at the decision making levels of the networks.

As a TV producer and host, I could not always determine, accurately, who should be the spokesperson on an issue, on the basis of a phone call, or a news article. My boss was very aware of the Fairness Doctrine's presence, and reminded me of it from time to time. I never felt it to be onerous, nor an intrusion on my judgement. Producers are busy people, operating under heavy time constraints. The tendency is to put on the known quantity, the person with the track record and the publicist backing him, or her. One network producer told an irate RID chapter head who wanted to know why RID did not appear on a national program on drunk driving, even though RID initiated the citizen movement effectively, in 1978, that the person chosen to speak for the citizen movement against drunk driving had better public relations people than RID. As a 100 pecent volunteer group, RID employs no p.r. staff to stir the media interest, nor should we. It is the job of the news & program producers in the broadcast media to find out who can answer the hard questions because of experience and standing in the field. Who should be allowed access to the public to speak. When producers fail, so that an issue is being handled badly, or unevenly, or if an entire information gap isn't being covered, or is being withheld from the public, then we must have the Fairness Doctrine to redress the matter. (See following case in point).

RID-USA AND THE FAIRNESS DOCTRINE, A CASE STUDY COMPILED AND REPORTED BY DORIS AIKEN, PRESIDENT AND FOUNDER, MEMBER, NATIONAL COMMISSION AGAINST D. D.

December 13, 1983, ABC Network, Good Morning A.M. Launching National Drunk Driving Awareness Week, ABC presented Dr. Joseph Pursh, a member of the former Presidential Comm. on Drunk Driving, who emphasized his view that putting DWI offenders in jail or giving them community service was a key drunk driving countermeasure recommended by the Commission. RID does not agree with that view, and it was not a key recommendation by the Commission, who was referring to repeat offenders when they advocated jail (or those driving with a revoked license).

That same evening, on Nightline, ABC presented a program concerning drunk driving countermeasures. A judge and 2 lawyers talked about why DWI cases often failed to be prosecuted in the courts. When asked why juries don't want to convict DWI cases, the judge said it was a mystery to him why they didn't. It is no mystery to RID who has been monitoring courts and cases for five years, in depth. RID was not permittd to explain to the public how lawyers are trained to knock off all jury members who understood anything about photography, chemistry, or who were accustomed to pass tests, or who respected the laws of physics and the concept of tests. "Social dropouts" were to stay on the jury, those who never passed tests and therefore had no faith in them, heavy drinkers, etc. RID was told, after immediate adverse reaction from some RID leaders to the program, that the other citizen action spokesperson had been chosen to respond to the judge and lawyers because "they had better public relations people". I was also told by a Nightline staff person that the next time they did a story about the criminal justice system and drunk driving, RID would be called. In fact, RID was always called, but never allowed to appear during the three years from 1981 to '84 that ABC was doing programs on the drunk driving issue. December 16th I wrote to the President of ABC, Mr. Anthony Thomopoulos, to request time under the Fairness Doctrine so that RID could present the facts about the criminal justice system's erosion by defense lawyers, many serving as legislators at the State Capitols, putting the loopholes in the law.

Three weeks later in January, Nightline again presented a story on the criminal justice system using a drunk driving case as a model with several lawyers opining about jury selection and jury judgements. RID was not called once again. Since my original request under the Fairness Doctrine was in the works, a meeting at a very high level was arranged to discuss our discontent. I received a letter from a Nightline producer, that she saw we were talking to the right people now. While one half of the ABC decision makers (a lawyer) didn't think we had a case, the other half in charge of fairness practices did. We are continuing our demand for time under the Fairnes Doctrine with the FCC this very afternoon. I believe that in the near future, the American public will be able to hear what they have to do to control drunk driving and in addition, get RID of the loopholes in the criminal justice system that permits defense lawyers to earn heavy fees to get violent, repeat offenders back into the mainstream of society.

Rather than removing the Fairness Doctrine from the broadcasting standards, the Committee should beef up its provisions, guaranteeing time to those who present a convincing case. The public would be better served in the long run.

The CHAIRMAN. Thank you very much. You make a good case. I have no more questions.

Larry, thank you.

Mr. GOLD. Thank you, Senator.

The CHAIRMAN. We will conclude with a panel of Howard Bell, Eddie Fritts, Harriet A. Kaplan, Ed Godfrey, and Jeri Warrick-Crisman.

Mr. Bell, go right ahead.

STATEMENTS OF HOWARD BELL, PRESIDENT, AMERICAN ADVERTISERS FEDERATION; EDDIE FRITTS, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS; HARRIET A. KAPLAN, NATIONAL RADIO BROADCASTERS ASSOCIATION; ED GODFREY, PRESIDENT, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; JERI WARRICK-CRISMAN, PRESIDENT, AMERICAN WOMEN IN RADIO & TELEVISION

Mr. BELL. Thank you, Mr. Chairman.

Thank you and the committee for the opportunity to present our views on S. 1917.

The American Advertising Federation supports the repeal of the FCC's fairness doctrine and its application in particular to product and service commercials and so-called advocacy advertisements or advertorials, that is, commercials which present views or are alleged to present views on controversial issues of public importance.

I will now summarize my statement, and I appreciate that my more detailed statement has been placed in the record.

As its name implies, the American Advertising Federation is an organization or association of all the interests in advertising, including local clubs and federations, with some 25,000 members throughout the country, as well as over 400 corporate members. These include national advertisers, national advertising agencies, newspapers, magazine publishers, radio and television publishers, and networks.

We have two principal reasons for urging legislative repeal of the Fairness Doctrine. First, we believe it is deterimental to the public, to advertisers and to broadcasters. Second, we believe that it constitutes a scheme of enforced censorship, which is repugnant to the first amendment of the Constitution.

We believe it is unfair to the public because it denies the public the opportunity to hear or view messages of importance on public issues which advertisers often themselves would like to present. Public opinion surveys in fact reveal that the broadcast audience wants to hear or view the business community's views on these issues of public importance.

But in the 1980 survey by Public Opinion Research Corp., it showed that 85 percent of the American public thinks that corporations should be allowed to present their views on controversial issues in television commercials. That is a 13-percent increase from the percentage of Americans who felt that way in 1978.

As we see it the public is being shortchanged and effectively denied this opportunity to view and hear these critical issues in their homes.

The doctrine we believe is also unfair to advertisers. It denies advertisers the right to speak out on the issues which affect them in the media which reaches almost every U.S. household. Even in their institutional ads, which merely present their companies in a favorable light, they have to be closely screened and edited and amended perhaps by broadcasters to make certain that by some stretch of the imagination there is not an issue of public importance implied by the mere broadcast of that advertisement about the company and their policies.

It should be noted, of course, that we are not just talking here about corporate advertisers. The doctrine applies equally to consumer organizations, public interest groups, as we have heard this morning members of Congress, and even public charities.

In fact, in Ohio the FCC ruled that advertisements for the United Appeal Fund in the city of Dayton created a fairness obligation because there were those who wanted access to urge that people make contributions direct to their favorite charity, not through the United Appeal.

As for broadcasters, they are the unhappy middlemen. They are forced to act as censors against their own inclinations and economic interests. They have to either refuse such advertisements or offer time to other groups, perhaps on a nonpaying basis if that is required, to any spokesman for a contrary view.

It has even been suggested, in fact, that the newspapers could be in jeopardy if this doctrine persists. Arthur Sulzberger, the publisher of the New York Times, said:

> Not only are newspaper companies now heavily involved in radio and television, but the whole process of publishing is a combination of two sciences. The New York Times, for instance, takes to the airwaves each night to publish in Chicago, California, and Florida through satellite technology. Gannett's USA Today and the Wall Street Journal also use such technology. As these airwaves are licensed, are not traditional print publishers already a bit "pregnant"? Is not the Government already in our business and we but have to find it out before a court of law?

As to the constitutional issue, we know the Supreme Court upheld the constitutionality of the Fairness Doctrine in the *Red Lion* case. *Red Lion* was based on the premise that an abridgeable first amendment right of the press could not be granted to broadcasters because they operate on a limited number of frequencies.

The double standard that the Supreme Court employed in such rulings on the first amendment rights of newspapers versus broadcasters can no longer be logically based on the scarcity rationale. We know it has been testified here the number of broadcasting and television outlets has dramatically increased in those 15 years since the case was handed down.

There are now close to 5,000 AM radio stations, over 3,000 FM, and over 800 television stations, in addition to the noncommercial stations in the United States. And also low-powered television stations and direct broadcast satellite transmission will increase this availability, and of course cable is growing with rapid strides.

In addition to the evidence refuting the scarcity rationale, there are indications that members of the Supreme Court themselves may be dissatisfied with that decision.

To illustrate, Justice Potter Stewart, concurring in *Columbia Broadcasting System* v. *Democratic National Committee,* stated:

> Those who wrote our First Amendment believed that "fairness" was far too fragile to be left for a government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice. If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom.

It is hardly possible to embellish on Justice Stewart's statements in this case. In short, it seems to us in the American Advertising Federation, the conclusion that the Fairness Doctrine, that was designed originally to insure a multiplicity of viewpoints in our society, has had just the opposite effect. It has in fact reduced the number of viewpoints that are presented to the American people.

For all the reasons stated here and in our more detailed statement, we believe that the public interest would be served by repeal of the fairness doctrine.

Thank you for the opportunity to testify.

[The statement follows:]

STATEMENT OF HOWARD H. BELL, PRESIDENT, AMERICAN ADVERTISING FEDERATION

First, I want to thank the Chairman and the Committee for this opportunity to testify on S. 1917. As will appear from my testimony, the American Advertising Federation (AAF) supports those portions of the bill which would repeal the F.C.C.'s fairness doctrine as it applies to product and service commercials and to so-called "advertorials", that is, broadcast announcements which present views, or are alleged to present views, on controversial issues of public importance.

While the "equal time" provisions of section 312(a)(7) and section 315 of the Communications Act do present serious problems, those problems only peripherally involve advertising and are, somewhat outside the scope of our direct interests. Of course we recognize that section 315, as amended in 1959, is viewed by some as codification of the broad reaches of the fairness doctrine and, if that view is correct, then our testimony should be construed as urging amendment of that section.

As its name implies, the AAF is a federation of more than 200 local advertising "clubs" or "federations" located in cities around the United States. These local bodies have a combined membership of more than 25,000 advertising practitioners. The membership of these local affiliates consists of advertisers, advertising agencies and advertising media, including the print, broadcast and outdoor mediums. Additionally, AAF has approximately 400 "company" members consisting of national advertisers, large and small advertising agencies, newspaper and magazine publishers, radio and television broadcasters and networks. Twenty-two other trade associations representing advertisers, agencies or media also hold membership in our Federation. Clearly, our membership, which embraces all elements of the advertising industry, has a direct interest in the fairness doctrine and this proposed legislation.

APPLICATION OF THE FAIRNESS DOCTRINE TO THE ADVERTISING OF COMMERCIAL PRODUCTS OR SERVICES

In its 1974 "Fairness Report" (48 F.C.C.2d 1) the Commission acknowledged that it had made a mistake in 1967, when it extended the fairness doctrine to advertisements for cigarettes because, in retrospect, such advertisements cannot "realistically be said to inform the public on any side of a controversial issue of public importance." The Commission then announced that "in the future, we will apply the fairness doctrine only to those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues." (48 F.C.C.2d at 26). Ostensibly, this policy statement put an end to the controversy over application of the doctrine to advertisements for commercial products and services. But did it?

The fact remains that as long as the fairness doctrine has a statutory base it is the federal judiciary, and not the Commission which makes the final decision on these questions. Although the District of Columbia Circuit Court sustained the policy announced in the Fairness Report, it did so in a manner which indicates that it would be more sympathetic than the Commission to complainants seeking to invoke the doctrine. In *National Citizens Committee for Broadcasting* v. *F.C.C.* (567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978)), the Court stated that, although First Amendment protection applies to commercial speech, this protection does not carry with it the right to broadcast a view. The Court agreed with the Commission that fairness doctrine obligations would attach to a product commercial which involved "obvious and meaningful discussion" on one side of a controversial issue but cautioned that the "difference between obvious and unobvious advocacy is not obvious." 567 F.2d at 1110. The Court then remanded the case to the Commission for consideration of two alternative proposals for implementation of the fairness doctrine.

As the Committee well knows, controversial issues of public importance come and go as do Congressional majorities, administrations and F.C.C. commissioners. The only stable and continuing element is the law as embodied in the statute. As that law now stands, a simple majority of appointed officials have the power to do as they see fit with the fairness doctrine, limited only by constitutional considerations. Given these premises, can anyone view with equanimity how future courts or commissions will resolve fairness questions with respect to products or services which are in themselves controversial.

APPLICATION OF THE FAIRNESS DOCTRINE TO EDITORIAL AND INSTITUTIONAL ADVERTISING

The Commission's enforcement posture with respect to editorial advertising, i.e., advertising which contains a direct and substantial commentary on an important public issue, is clear and unequivocal. As stated in the *Fairness Report:* "We can see no reason why the fairness doctrine should not apply to these 'editorial advertisements' in the same manner that it applies to the commentary of a station announcer." 48 F.C.C.2d at 22. Thus, a licensee which accepts such paid announcements must set aside time for opposing views, must solicit spokesmen to present the views and must provide free air time to those who cannot afford it. *See Cullman Broadcasting Co.*, 40 F.C.C. 576, 577 (1963). The consistent failure to allow the airing of opposing views will result in the non-renewal of a broadcaster's license. *See Brandy-*

wine-Main Line Radio, Inc., 24 F.C.C.2d 18, 34–35 (1970), *affirmed*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

While the application of the doctrine to the overt editorial advertisement is clear, its application to so-called institutional advertising which merely presents the advertiser's operations in a favorable light is uncertain and unclear. Such advertising does not explicitly address a controversial issue but may be held subsequently to have implicitly presented a view on one side of a controversy. The Fairness Report recognizes that "this judgment may prove to be a difficult one and individual licensees may well reach differing conclusions concerning the same advertisement." The test, according to the Commission, is whether the advertisement "presents a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance." 48 F.C.C.2d 23–24.

While this "meaningful and obvious" test appears to provide broadcasters with reasonably clear guidance as to the manner in which they must exercise the censorship function forced upon them by the government, their judgements are always subject to secondguessing by the Commission. For example, in 1977 several Washington television stations broadcast a Texaco commercial which stated, in effect, that an oil company like Texaco which operates in all phases of the oil business, from drilling to marketing, can efficiently and economically "do its job for you."

While it is questionable whether many members of the public or even broadcasters were aware of it, there was a move afoot in Washington at the time to force the oil companies to divest themselves of one or more phases of their integrated operations. Consequently, the Commission in "Energy Action Committee Inc.," 40 P&F Radio Reg. 2d 511 (1977) found that the assertions in the ad with respect to the economy and efficiency of vetical integration went to the essence of the divestiture issue and triggered the fairness obligations. The licensee's arguments that the structure of the oil companies was not a controversial issue of public importance and that, even if it was, the ads did not make a meaningful and obvious statement of the issue did not persuade the Commission.

We could cite other instances involving advertisements describing oil drilling in Alaska, clear cutting of timber and the advantages of nuclear power but to do so would only lengthen this testimony without shedding much additional light. The point is that application of the doctrine to institutional advertising forces broadcasters to engage in a highly subject guessing game. They are expected to be aware of every public issue which might peripherally or inferentially be addressed in the advertising presented to them. Like it or not they must censor the messages which advertisers desire to present to the public or face economic consequences and possible loss of their licenses.

As a result, editorial and institutional advertising is seldom broadcast by either television or radio stations. Licensees, especially the smaller ones, cannot afford to offer free time for opposing views nor can they afford the time and expense of responding to an F.C.C. proceeding. On small station, KREM-TV Spokane, expended more than 480 man hours and over $20,000 in legal and travel expenses in successfully rebutting fairness complaints charging that an editorial in favor of Expo 74 violated the doctrine. H. Geller, "The Fairness Doctrine in Broadcasting: Problems and Suggested Course of Action," Rand, R. 1412-ff (1973).

WHY THE FAIRNESS DOCTRINE SHOULD BE REPEALED

We have two principal reasons for urging legislative repeal of the fairness doctrine. First, we believe that it is unfair to the public, to advertisers and to broadcasters. Secondly, we believe that it constitutes a scheme of enforced censorship which is repugnant to the First Amendment of the Constitution. But, before I enlarge on these points I would like to explain why we feel that legislation is needed now to remedy this situation.

We are aware of a body of opinion which holds that legislation is unnecessary at this time because the present incumbent Commissions have little sympathy for the doctrine and are unlikely to enforce it except in extreme cases. This argument not only overlooks the transitory nature of the present Commission majority but also, the fact that the Commissioners must enforce the law as written. Moreover, the judges in the United States Courts of Appeals will enforce the doctrine, at least to the extent to which it has a statutory basis. Thus a broadcaster can ill affort to base his decisions upon how he believes the Commission will react but must, additionally, attempt to predict how a court will react to a Commission decision in his favor.

The argument against a legislative remedy also fails to take into account the fact that even the present Commissioners must enforce the doctrine with respect to advertisements which are clearly editorial. Chairman Packwood, in a "op ed" piece which appeared in the Los Angeles Times on October 31, 1983, praised the present Commission for its efforts to "cut through this jungle of regulation and limit its growth" but cautioned, the Commission "can only go so far as long as the Communications Act mandates that it examine the editorial and news content of news-broadcasters."

In short, legislation is needed and it is needed now. Much of what I have to say about the unfairness of the doctrine to the public, advertisers and broadcasters is apparent from the comments I have just made with respect to the manner in which the doctrine operates. But, let me as briefly as possible, further explain our views on this question.

First, we believe that it is unfair to the public to deny it the opportunity to hear or view messages on important public issues. The doctrine is predicated on the belief that an untrammeled right to broadcast views on public issues would result in only one side of a question, the advertiser's, being presented to the public. But this simplistic rationale overlooks the fact that charges against a product or a company made by either government or private persons receive coverage in newcasts. It is featured news when a product is alleged to be unsafe or a company is charged with an antitrust or other law violation. The companies or industry under fire are frequently not in position to immediately provide a point-by-point rebuttal and even if they are, defensive statements are not quite as news worthy as prosecutorial accusations.

Public opinion surveys reveal that the broadcast audience wants to hear or view the business community's views on issues of public importance. A 1980 survey by Opinion Research Corporation shows that 85 percent of the American public think corporations should be allowed to present their views on controversial matters in TV commercials—a 13 point increase from the percentage of Americans who felt that way in 1978. One can gather from this that the great majority of Americans endorse the view of Justice Powell, that the First Amendment prohibits "government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978).

Thus, as we see it the public is shortchanged and effectively denied the opportunity to hear or view in their homes, advocacy of either side of a public controversy.

The doctrine is unfair to advertisers in that it denies them the right to speak out on issues which affect them in the medium which reaches almost every United States household. It is unfair in that even their institutional ads, which merely present their companies in a favorable light, must be closely screened, edited and amended by broadcasters to make certain that advocacy of one side of an issue is not implied. It is unfair in that even product commercials may trigger fairness obligations, as they did in the past, should the enforcement posture of the F.C.C. change.

It must be emphasized that not all "advertisers" are commercial businesses. The doctrine operates with equal force against consumer organizations, public interest groups, members of Congress and even public charities. For example, in *United People, Dayton, Ohio*, 32 F.C.C.2d 124 (1971) the Commission ruled that advertisements for the United Appeal created fairness obligations; that it was unreasonable for a licensee to refuse to air the petitioner's counter-commercials which would have urged the public to give directly to their favorite charity instead of to the United Appeal.

As for broadcasters, they sit as the unhappy middlemen forced to act as censors against their own inclinations and economic interests. They are truly between a rock and a hard place for they must either refuse to accept a suspect advertisement and forego the revenue it would produce or offer equal time, perhaps on a nonpaying basis, to the spokesman for an opposite view. Insofar as his First Amendment rights are concerned, the broadcaster is truly a second-class citizen. He faces not only economic loss but actual loss of his right to broadcast if he exercises the editorial freedom which every other information dispensing medium enjoys.

But, even the editorial freedom of newspapers may be in jeopardy. As arthur Sulzberger, publisher of *The New York Times*, put it:

". . . Not only are newspaper companies now heavily involved in radio and television, but the whole process of publishing is a combination of the two sciences. The New York Times, for instance, takes to the airwaves each night to publish in Chicago, California, and Florida, through satellite technology. Gannett's USA Today and The Wall Street Journal also use such technology. As these airwaves are licensed, are not traditional print publishers already a bit "pregnant"? Is not the government already in our business and we but have to find it out before a court of law? "The Fairness Doctrine is Unfair," Nov. 17, 1982, speech to Alexander Hamilton Awards dinner, Columbia University."

I turn now to the constitutional issue. The Supreme Court upheld the constitutionality of the fairness doctrine in *Red Lion Broadcasting* v. *F.C.C.*, 395 U.S. 367 (1969). But, *Red Lion* was based upon a factual background which has greatly changed. It is axiomatic in law that when the facts change the outcome will be different and, we are morally certain that the drastic changes which have taken place in the electronic media industries since 1969 have vitiated *Red Lion* as a valid precedent.

Red Lion and, indeed, the fairness doctrine itself are founded upon the so-called scarcity rationale. As the Supreme Court put it in *Red Lion* :

"[I]t is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only ten frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. 395 U.S. 388-389."

That the double standard employed by the Supreme Court in rulings on the First Amendment rights of newspapers and broadcasters can no longer be logically based upon the scarcity rationale can be clearly demonstrated. In a December 8, 1981 speech to the American Advertising Federation's Annual Law Conference, F.C.C. Commissioner Anne P. Jones told us: "At least 90 percent of American households receive three or more over-the-air television signals and six or more radio signals. Virtually all Americans are served by several times more broadcast stations than daily newspapers." Contrast this with the figures on newspapers. In 1973 only 5.4 percent of daily newspapers had a direct competitor in the same city. At that time there were less than 1,800 daily newspapers in the United States.

The number of separate broadcasting and telecasting voices has steadily increased. As of last month, there were 4,733 AM stations, 3,572 commercial FM stations and 862 commercial television stations on the air. In addition, there were 1,122 FM educational radio stations, 173 educational UHF T.V. stations and 114 educational VHF T.V. stations. F.C.C. News Release, January 17, 1984.

While it is true that additional VHF television stations may not be available in the larger markets, the authorization of low-power television and direct broadcast satellites will further increase the availability of free television. And, of course, cable continues to grow with the expectation that basic cable households are expected to increase from approximately 23 million to 47.3 million by the 1989-90 season.

Finally, the advent of teletext, a system whereby a television broadcaster can transmit printed material to television sets equipped with a decoder has complicated the distinction between print and broadcast media. Thus the Commission in 1983 exempted teletext from the fairness doctrine (53 R.R.2d 1309, 1322-24).

In addition to the evidence refuting the scarcity rationale, there are indications that members of the Supreme Court panel which decided *Red Lion* are dissatisfied with the decision. To illustrate, Justice Stewart, concurring in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 145-46 (1973) said:

"Those who wrote our First Amendment . . . [b]elieved that 'fairness' was far too fragile to be left for a government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice.

"This Court was persuaded in *Red Lion* to accept the Commission's view that a so-called Fairness Doctrine was required by the unique electronic limitations of broadcasting, at least in the then-existing state of the art. Rightly *or wrongly,* we there decided that broadcasters' First Amendment rights were 'abridgedable.' But surely this does not mean that those rights are nonexistent. And even if all else were in equipoise, and the decision of the issue before us were finally to rest upon First Amendment 'values' alone, I could not agree with the Court of Appeals. For if those 'values' mean anything, they should mean at least this: *If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom*" (Emphasis added.)

I could say much more but I deem it impossible to embellish or improve upon Justice Stewart's statement. As he said, in our democracy, when a choice must be made between free judgment and censorship by government fiat "the choice must be for freedom".

For all of the foregoing reasons we believe that the public interest requires repeal of the fairness doctrine by enactment of S. 1917. Thank you again for the opportunity to present these views.

The CHAIRMAN. Thank you, sir.

Eddie Fritts, representing the National Association of Broadcasters.

Mr. **Fritts**. Thank you, Mr. Chairman. Certainly we appreciate the opportunity to testify today on behalf of the National Association of Broadcasters, also on behalf and in support of S. 1917, the Freedom of Expression Act.

NAB represents more than 4,500 radio and 700 television stations and the major commercial broadcast networks. Repeal of the Fairness Doctrine, the political broadcasting laws and other programing restrictions is a longstanding objective of NAB, which, aided by the leadership of Senator Packwood, NAB has pursued in a variety of forums.

For instance, today I would like to introduce to you our Executive Committee of the National Association of Broadcasters who are appearing in support of this legislation along with me. That group in total has affiliations with some 12 television stations, 34 radio stations, 51 daily newspapers and 55 weekly newspapers—certainly a diverse group.

Today, more than ever before, there are more issues, candidates, and groups competing for access to broadcast time. We have seen in the last decade a great increase in the number of special interest groups seeking to influence the political process at the Federal, State, and local levels. Hundreds of political action committees have emerged to profoundly change the political environment. And there has been a substantial increase in the number of ballot propositions and other initiatives prompted by grassroots political involvement.

It is not uncommon to have several major and minor party candidates running for a single office. Today, in fact, there are 17 declared candidates seeking the Democratic nomination for President in the New Hampshire primary. Four Republicans, in addition to President Reagan, are seeking the Republican nomination. This does not include the host of independents and fringe party candidates who run for President during each Presidential election year.

As more and more candidates and special interest groups vie for broadcast time, and as the controversial issues facing our communities multiply, the public is in need of more and more information—more news, more public affairs, and more meaningful debate on the issues of the day. Yet, positioned, ironically, as an obstacle to increasing the flow of information to the public are the Fairness Doctrine and political broadcasting laws.

Last week, this committee heard from broadcasters from around the Nation who came to testify about their experience with the Fairness Doctrine and the political broadcast laws. They came from large cities and small communities, and from both radio and television stations.

The Station manager from an AM station in Miami told about the efforts of a local utility company to manipulate the Fairness Doctrine in order to silence the station's editorials against a rate hike request.

The general manager of a network affiliate station in Phoenix told of how section 315 prevented his station from broadcasting, in its entirety, a speech by then-candidate Jimmy Carter on his first visit to Arizona.

A news director from Milwaukee spoke of a mayor's efforts to stifle criticism from the station by filing a personal attack rule complaint.

These broadcasters and others who testified demonstrated that the Fairness Doctrine and political broadcasting laws impose a regulatory straitjacket on the free flow of information at a time when the public seeks more and more information about the controversial issues of the day.

Now, I am not suggesting that all broadcasters have the desire or the intent to become electronic op-ed pages, devoting most of their time and resources to the presentation of controversial viewpoints or hard-hitting editorials. But I do believe that experience demonstrates that the reality of the Fairness Doctrine is that those broadcasters who are committed to such an ideal are being hampered from achieving it.

The laws and regulations that S. 1917 would repeal are hampering broadcasters from providing meaningful, indepth coverage of candidates and issues and blunting the editorial process by the threat of Government intrusion. As one station executive remarked, the Fairness Doctrine "makes it easier and more acceptable in this country to sell soft drinks than to promote hard issues.

In the *Red Lion* case the Supreme Court was not unaware that the Fairness Doctrine might have a chilling effect on the coverage of controversial issues. It noted that:

> If experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the value and quality of coverage, there will be time enough to reconsider the constitutional implications.

Today, 15 years after *Red Lion* and some 30 years since the Fairness Doctrine was first articulated and over 50 years since the political broadcasting laws were enacted, it is clear that the time to reexamine these restrictions is long overdue.

Congress should revisit and ultimately repeal content restrictions on broadcasting not only because of the chilling effect, but also because the purported justification for abridging the first amendment rights of broadcasters, the so-called scarcity rationale, is no longer tenable. When the Communications Act was enacted in 1934, there were 583 AM stations and no FM or television stations on the air. Today, there are over 9,300 AM and FM radio stations and over 1,100 television stations. An estimated 28 percent of television households currently receive 10 or more television stations over the air and 80 percent receive 5 or more signals. The authorization of thousands of low power television stations and several direct broadcast satellites will further increase the availability of free over-the-air television. In addition, approximately 40 percent of American households have access to cable television, and there is an array of emerging delivery systems such as multipoint distribution services, satellite master antenna television, video cassettes, and video discs. The environment is substantially different from that of 1927 when Congress, fearing that a small number of radio stations and equipment manufacturers would monopolize the limited frequencies available, imposed limitations on free expression by broadcast licensees. Compounding this is the dramatic growth projected in the pay video marketplace through the next decade, as well as technological developments which allow more efficient use of spectrum to produce even more delivery system opportunities. The scarcity rationale has become an anachronism.

The proliferation of new technologies has blurred the traditional distinctions between the print and broadcast media. Thus, with the emergence of electronic publishing it has become harder for regulators to distinguish between print and broadcast journalism.

The new electronic publishing technologies pose a regulatory dilemma: Should we continue the increasingly difficult task of drawing a line between those journalists who will be accorded full first amendment rights and those who, like broadcasters today, shall be accorded second-class citizenship? Justice Stewart suggested an answer to this question when he wrote that "If first amendment values mean anything, they should mean at least this: if we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom."

There are those who oppose this legislation, some of whom you heard from. And as you observed, many of those who oppose repeal of content restrictions speak not solely for fairness, but also from a desire to have the broadcast media represent their unique viewpoints.

Naturally, many groups support laws and rules that allow them access to the airwaves, often free of charge. What tends to get lost in discussions of the Fairness Doctrine and section 315 is that broadcasters are journalists. As journalists, we in the broadcast industry adhere to our own code of fairness, the fairness inherent in journalistic ethics of accuracy and objectivity.

The difficulty arises when the Government gets into the act by second-guessing editorial decisions, by deciding what is and is not fair, and, as Justice Douglas once observed, by allowing "administration after administration to toy with TV and radio in order to serve its sordid or its benevolent ends."

It has been said that misplaced logic is the art of going wrong with confidence. Perhaps nothing exemplifies this statement better than the history and effect of content restrictions on broadcasting. Instead of facilitating robust discussion on the controversial issues of the day, the fairness doctrine and political broadcasting laws have inhibited meaningful debate.

The very premise of these restrictions is at odds with the first amendment, and their constitutional justification—scarcity—no longer exists. In sum, Mr. Chairman, broadcasters have opposed their second class status under the first amendment from the outset and we continue to do so today. We have been the victims of these restrictions, but perhaps no more than the public, which suffers most from the bottleneck on information that these laws and regulations impose.

We applaud you for introducing S. 1917 and fully support it as an opportunity to achieve full first amendment rights for broadcasting.

Thank you.

The CHAIRMAN. Thank you.

Ms. Kaplan, representing the National Radio Broadcasters Association.

Ms. KAPLAN. Thank you, Mr. Chairman.

I am representing today the National Radio Broadcasters Association, which represents over 2,000 AM and FM stations across the United States. I am also a liensee of two radio stations in Charlotte, N.C.

The NRBA endorses the Freedom of Expression Act of 1983 because this legislation protects the paramount value of freedom of expression. The provisions of the Communication Act which this legislation repeals have been justified on a broadcast spectrum scarcity which has absolutely no factual or logical basis in light of the over 9,000 ratio stations and 1,000 television stations operating in a communications marketplace which is extremely diversified today.

The Supreme Court has ruled that the first amendment prohibits the Government from intruding into newspaper editorial judgment, which has been much discussed here today. The same standard should absolutely apply to broadcast communications media.

Sections 312 and 315 of the Communications Act lead broadcasters to provide less, rather than more, diversified programing and information, because those provisions give direct incentives for self-censorship to avoid governmental interference. I, along with many other broadcasters, can personally give many instances where this occurs on a regular basis.

Those provisions are not constitutionally justified and impair the exercise of first amendment freedoms. Therefore, we support, NRBA supports, the intent of S. 1917 to repeal all of these that inhibit such activity.

I would also like to comment, if I might, on a couple of things that have taken place previously this morning. The Senator who is no longer here, Senator Pressler, talked about the fact that everyone "reads from the Washington Post" and that is the entire news throughout the United States. I think that many people who live in Washington or live in New York, if it does not come in the Washington Post or the New York Times, they think it does not exist.

And No. 2, this is not used as a rip and read source for radio stations throughout the United States. As a matter of fact, I do not know what the circulation of the Washington Post is, say, in North Carolina. I am sure it has some. But I do not know any stations, radio or television, who regularly quote the Washington Post as their news source throughout their news day on most days.

The other thing was the lady who spoke a few minutes ago concerning the drunk driving activity and that there was no—absolutely nothing going on in the drunk driving area or antidrunk driving area. North Carolina I think is a good example of a State which has just passed a rather rigorous drunk driving law.

The organization called MADD, which is Mothers Against Drunk Drivers, is all over every piece of media all the time in the State of North Carolina, whether it is print or electronic, and has given a great deal of publicity, and this whole issue has been given a great deal of publicity in North Carolina, and this is also taking place in other States across the United States.

Whether her organization is another question, but certainly the drunk driving issue is one that is receiving a great deal of publicity and news coverage across the United States.

[The statement follows:]

STATEMENT OF HARRIET A. KAPLAN, ON BEHALF OF THE NATIONAL RADIO BROADCASTERS ASSOCIATION

My name is Harriet A. Kaplan. I am the former President and member of the Executive Committee of the National Radio Broadcasters Association, a non-profit trade association which represents approximately 2,000 AM and FM radio stations located throughout the United States. I am also the majority stockholder and Chief Executive Officer of Sis Radio, Inc., licensee of Station WAYS and WROQ-FM, Charlotte, North Carolina. I want to thank the Committee for giving me this opportunity to present the views of the NRBA concerning the Freedom of Expression Act of 1983.

The NRBA heartily endorses this legislation because it protects the paramount value of freedom of expression. We thoroughly agree with the findings of Senate Bill S. 1917 and particularly with the finding that the most effective method to ensure that the public receives a variety of ideas and experiences is to eliminate government regulation of the content of information which the broadcast media provides. The NRBA strongly believes that radio should be freed from excessive government regulation. Nowhere is the need to eliminate cumbersome and counterproductive government control more basic than in the area of Sections 312 and 315 of the Communications Act, since these provisions allow the government to regulate the content of what broadcasters say. Thus, the NRBA supports the purpose of S. 1917 to repeal Sections 312 and 315 and to clarify Section 326 in order to make clear that the government may no longer censor or control the content of broadcast communications.

The NRBA believes that the Communications Act currently allows a degree of governmental regulation of editorial decisions and political debate which is inconsistent with basic First Amendment principles. This regulation leads to less, rather than more, spirited debate and chills the diversity of voices which the First Amendment was designed to foster. In today's media market there simply is no justification for any governmental regulation of the right of broadcasters to engage in free speech. It is time to give broadcasters the same basic rights to engage in free expression as the print media enjoys. This is what S. 1917 is designed to accomplish.

A bit of background about Sections 312 and 315 is useful in order to understand the need for S. 1917. Broadcasters are subject to the FCC's fairness doctrine which was ratified by 1959 amendments to Section 315. The fairness doctrine requires broadcasters to cover public issues and provide an opportunity for contrasting viewpoints. The Supreme Court upheld the fairness doctrine in *Red Lion Broadcasting Co.* v. *FCC* [1] when it affirmed two right of reply rules which the FCC had developed as corollaries of the fairness doctrine. These corollaries are the "personal attack" and "political editorial" rules. A third right of reply doctrone, the "equal time" rule for political candidates, is explicitly enacted in Section 315.

Section 312 which Congress enacted in 1971 requires broadcasters to provide "reasonable access" to their facilities for federal candidates. This statute was upheld in *CBS, Inc.* v. *FCC,* [2] which dealt with the request of the Carter-Mondale compaign committee to the networks for advertising time. The networks denied the request because they claimed it was for too much time and that it came too early in the campaign and they appealed from the FCC decision that their action violated Section 312. The Court, however, referred to its analysis in *Red Lion* and approved in FCC's administration of the "reasonable access" requirement.

The basic justification employed by the Court in the two cases I have described to uphold the fairness doctrine and Sections 312 and 315—which I shall generally describe as the "fairness doctrine and political advertising obligations"—has been the theory that there are limited broadcast frequencies and, thus, the government must regulate the content of the broadcasts aired by those who the government selects as licensees of those frequencies. This spectrum scarcity rationale, however, has serious factual and logical flaws. Americans are served today by over 9,000 radio station and 1,000 television stations, which far outweighs the number of newspaper. And while the number of competing daily newspapers has decreased over the past years, the number of broadcast stations has continued to grow. For instance, in the radio field, the FCC has modified its FM rules to permit the assignment of up to 1,000 additional FM stations and has increased the number of AM stations in recent years by amendments to various technical rules.

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[1] 395 U.S. 367 (1969).
[2] 453 U.S. 367 (1981).

These numerous broadcast outlets for expression operate in a thriving and diverse communications marketplace. The National Telecommunications & Information Administration recently reported to the Subcommittee on Communications of this Committee that:

"Any objective review of the communications field today will clearly show an explosion in the number of new video, audio, print and blended technologies which reach significant numbers of the American public today. Already the developments in telecommunications offer a vast array of outlets for disseminating information. Given these developments and those to come, the electronic media can no longer be considered scarce, in relative or absolute terms, particularly when compared to the decline in competitive daily newspapers.[3]

Thus, to the average American, there is no shortage of either broadcast stations or, more importantly, of diverse sources of news and information.

Even the FCC, the agency charged with overseeing the fairness doctrine and political advertising rules, has recognized the fact that the spectrum scarcity rationale has lost whatever factual or logistical validity it may have once had and, in 1981, the FCC recommended that the requirements of Sections 312 and 315 be repealed.

Aside from the factual question of how many competing sources of programming and information exist in the electronic communications market, spectrum scarcity does not justify intrusions into First Amendment freedoms. Even if some media scarcity existed, the First Amendment does not limit its protection to an independent and numerous press. The few partisan newspapers serving the young nation at the time of the adoption of the First Amendment provide graphic evidence that the farmers of our Bill of Rights did not imagine that freedom of speech should be limited based on the number of speakers. I stress the number of newspapers because the Court has ruled in *Miami Herald Co.* v. *Tornillo*[4] that right of reply requirements similar to the fairness doctrine and political advertising obligations are flatly unconstitutional if applied to newspapers. The Court recognized that few American cities are served by competing local newspapers, but refused to rely upon a newspaper scarcity theory to allow government intrusion into the editorial process of newspapers. Instead, the Court held that right of reply obligations violate the First Amendment because they intrude into the function of editors. According to *Miami Herald*, "it has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press. . . ."[5]

The clear teaching of *Miami Herald* has not been followed in the broadcasting field because of the scarcity rationale. Yet this rationale has no validity today and, in any event, does not justify government intrusion into free speech. Radio broadcasters are proud of and strive to protect their journalistic independence and editorial freedom. These values are thwarted, however, by the current system of broadcast regulation contained in Sections 312 and 315.

The difference between the First Amendment protection accorded the electronic media and the print media seems to be merely one of tradition. Broadcast regulation was imposed in the 1920s before First Amendment analysis was relatively developed and when few, if any, understood the potential of the new electronic communication sources. By the time of *Red Lion*, the broadcast regulation scheme had been in effect for four decades, and it appears that the spectrum scarcity rationale was merely a "post hoc attempt to explain the status quo."[6] The courts are beginning to question this tradition, as is show in a recent passage from the Court of Appeals in *Loveday* v. *FCC*:

"Today when the number of broadcast stations not only far exceeds the number when the Communications Act was adopted . . . but rivals and far exceeds the number of newspapers and magazines in which political messages may effectively be carried, it seems unlikely that the First Amendment protection of broadcast political speech will contract further, and they may well expand."[7]

Nevertheless, it is the responsibility of Congress as well as of the courts to protect First Amendment values and foster the freedom of expression on which this nation was founded.

Because of the number of broadcast stations, particularly radio broadcast stations, there is no need for detailed government oversight to ensure that diverse sources of information exist. Radio broadcasters have every incentive in today's communication marketplace to provide diverse and novel formats, including all news programming and other sorts of material tailored to meet the needs and interests of different groups in the community. Government control imposed by the fairness doctrine and political advertising obligations, however, leads broadcasters to avoid controversial topics or political matters in some instances because the broadcast of such material carries with it a duty to offer time to other groups or candidates. It is perfectly understandable that broadcasters do not want the government to tell them what to say and how to say it, and that they do not want to become embroiled in detailed FCC oversight of their programing. Such oversight is inconsistent with free speech. It is also costly to adhere to FCC regulations and to defend against allegations that the regulations may have been violated. As a result, rather than fostering discussion of controversial issues and the expression of diverse opinion, the obligations imposed by Sections 312 and 315 actually stifle discussion and diversity and prevent broadcasters from fully responding to market pressures for innovative and diverse programing.

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[3] NTIA, U.S. Dept. of Commerce, "Print and Electronic Media: The Case for First Amendment Party" 81 (1983).

[4] 418 U.S. 241 (1974).

[5] *Id.* at 2589.

[6] Powe, "Or of the [Broadcast] Press," 55 Tex. L. Rev. 39, 62 (1976).

[7] 707 F.2d 1443, 1459 (D.C. Cir. 1983) cert. denied, 52 U.S.L.W. 340 (1983).

In the *Miami Hearld* decision, the Court explicitly recognized that newpaper editor "might well include that the safe course is to avoid controversy" when faced with a right of reply statute, and that a "[g]overment-enforced right of access inescapable 'dampens the vigor and limits the variety of public degbate . . . .' "[8] The FCC has recognized that the fairness and political advertising rules have this same effect on broadcasters of causing self censorship. In fact, the FCC has recently commenced a rule making proceeding to repeal the nonstatutory components of these obligations based on its recognition that the rules inevitably "chill" the selection of broadcast material and the exercise of editorial discreption.[9] As can be seen, therefore, the fairness doctrine and political advertising rules have the opposite result from what was intended.

The editorial discretion of broadcasters is no less critical to their exercise of First Amendment protected freedom of speech than is the editorial discretion of newspaper editors. Guaranteed freedoms of expression should not be restrained simply because the expression in being delivered by electronic means. To those who stress the significance of television and radio broadcasts to most citizens' daily lives and as sources of news I say this significance supplies the most important reason to extend the First Amendment to the broadcast media. Since broadcast communications have such a significant place in our lives, they must be subject to less, rather than more, government control over their content.

The tradition of imposing the fairness doctrine and political advertising obligations on the electronic media has no place in a nation which values the preservation of free speech. These obligations are directly based on the content of speech, and the Court has stated that it "has sustained content-based restrictions only in the most extraordinary circumstances."[10] As constitutional scholar Professor Tribe has contended, "any governmental action aimed at communicative impact is presumptively at odds with the first amendment."[11] The governmental action embodied in the fairness doctrine and Sections 312 and 315 is particularly at odds with the First Amendment since it tells broadcasters what they can and cannot say, limits the opportunity for political discussion because of its chilling effect on broadcasters' editorial discretion, and operates in an arbitrary fashion only upon the electronic media. For these reasons the NRBA believes it is time to extend the First Amendment to broadcasting, and therefore the NRBA endorses the Freedom of Expression Act of 1983.

The **CHAIRMAN**. I sensed that perhaps it is that her organization is not getting on, rather than the issue is not getting aired. I am like you. It seems to me that I have heard about this issue, including the antidrunk driving side of it, rather extensively in the news media, print, and broadcast.

Next we will hear from Ed Godfrey, the president of the Radio-Television News Directors Association and an old friend of mine from KEWM, Portland, Oreg. I guess we've known each other about 15 years.

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[8] 489 U.S. at 257.

[9] Notice of Proposed Rule Making in Gen. Docket No. 83-484, FCC 83-218 (released June 14, 1983).

[10] *Bolger* v. *Youngs Drug Products Corp.*, 103 S. Ct.

[11] L. Tribe, American Constitutional Law, § 12-2 at 581 (1978).

Mr. GODFREY. Yes, and we have not seen each other for about 7.

My organization appreciates the opportunity to present its views on S. 1917. I am president of RTNDA and will be until December 7 of this year, and I am presently a local news director at WAVE-TV in Louisville, Ky., owned by Cosmos Broadcasting. We have six television stations. We are headquartered in Greenville, S.C.

We news directors are determined to end our second class citizenship under the first amendment. The Communications Act requires Government regulation of the journalistic content of electronic media in ways clearly forbidden for regulation of print media content. The public we serve is the ultimate loser.

For many years RTNDA has actively opposed content regulation under section 315 of the act. In 1967, we unsuccessfully fought the FCC's adoption of the personal attack and political editorial rules and then convinced a Federal Court of Appeals to set aside those rules as a violation of the first amendment. In the final chapter of that case, which was consolidated with the *Red Lion* case, the Supreme Court upheld the constitutionality of the Fairness Doctrine which S. 1917 would so wisely abolish.

It is encouraging to see the FCC itself move full circle and now propose repeal of the personal attack and political editorial rules. It is heartening to see the FCC remove equal opportunity restrictions from candidate debates arranged by broadcasters. But there is only so much that the Commission can do consistent with section 315 and other provisions of the act, and the Commission itself could change its mind again at another time.

Ideally, as legal scholars have testified here, the first amendment and its interpretation by the Supreme Court should be our shield from Government intrusions of this kind. But we should not wait for this to happen, because the need for such reconsideration is long overdue. Therefore, we welcome and support this bill for statutory repeal of section 315 and the strengthening of statutory prohibitions against regulation of electronic journalism.

I need not repeat at length what is already in this hearing record to contradict the spectrum scarcity theory of *Red Lion*: About the large growth in the number of broadcast stations and about the dramatic developments in communications technology—both new forms and the potential for more efficient uses of the current allocations of the spectrum.

It is abundantly clear that there is no scarcity of electronic media outlets vis-a-vis print media outlets in America in 1984. While there were only 2,915 broadcast stations on the air in 1949, when the FCC first expressed its Fairness Doctrine, today there are 10,783, including 9,382 radio stations and 1,401 television stations. In stark contrast, there are today only 1,708 daily newspapers in America. Yet full first amendment freedoms are denied to broadcasters on the ground that they are more scarce than newspapers.

Moreover, there are a myriad of other video and audio services available or soon to be available to the public, such as cable television, low power television, DBS, MDS, SMATV, teletext and videotext, video discs, and cassettes—the list goes on. Government's response to this explosion of interacting and competing mass media of communications must be to permit these media to freely participate in and expand the open marketplace of ideas contemplated by the first amendment—and not to impose restraints on the form and content of those ideas.

Now we learn that whatever scarcity there may once have been in the amount of spectrum available for electronic media outlets has apparently disappeared. The FCC's chief scientist, Dr. Robert Powers, testified last week that there is today no shortage of spectrum capacity from a technological standpoint. Advancing technology has increased both the amount of spectrum available to electronic media and the amount of electronic traffic that can traverse radio frequencies. In short, it is only Government decisionmaking and economics that limit the amount of spectrum available to electronic media.

Certainly the Government should not be the cause of spectrum scarcity by the way it allocates frequencies, and then use that artificial scarcity as a reason for not following the normal requirements of the first amendment.

Similarly, the licensing structure of the Communications Act is no justification for program content regulation. Rather, the Government's involvement in the communications selection process should be no more than is absolutely necessary and should not permit the Government to bootstrap itself into a necessary and potentially dangerous control of media content.

The fact that radio and television are the predominant sources of public information and opinion today gives the Congress all the more reason to maximize that control in the hands of thousands of broadcast stations and cable television systems and the newer forms of electronic communication, instead of reposing potential national control in five FCC Commissioners with political ties.

The record in these hearings is heavy with witnesses' explanations of how complex and yet still uncertain the application of the fairness and equal time rules has become, how difficult it is for broadcasters to understand and keep up with the many aspects and interpretations of those rules, and how inhibited many station managers, all news directors, and their lawyers have become in making what should be purely journalistic judgments.

The hearing record also contains vivid examples of how misguided are the citizen and special interest groups that believe, incorrectly, that without this kind of regulation there will be less opportunity, rather than more opportunity, as we know there will be and as we have heard here, for the views of these and other groups to be presented.

We salute you, Senator Packwood, for spotlighting the defects of Government regulation of electronic journalism, and we hope that this committee will favorably report S. 1917 as quickly as possible.

The **Chairman**. Ed, thank you. You should have seen the look on the broadcasters' faces when Dr. Powers, the chief scientist, was testifying. I posed the question: If we gave up one UHF-VHF frequency, could we have 200 radio stations in an area? Dr. Powers did not think it would be 200. I said, how many in the Washington area? He said, "95 to 100." You could see the panic in all the radio stations about having 100 new outlets to compete with.

There is no scarcity. It is gone.

Mr. **Godfrey**. As you well know, in 1977 in Portland, Oreg., there were 37 AM and FM stations at that time, and I am sure there are more now.

The **Chairman**. There are more.

Ms. Crisman.

Ms. **Warrick-Crisman**. Mr. Chairman, members of the Committee on Commerce, Science, and Transportation:

My name is Jeri Warrick-Crisman and I am president/general manager/owner of WNJR Radio, Union, N.J., a position I have held since 1981. Prior to that time I was director of National Community Affairs for the National Broadcasting Co. in New York City. I have also been senior editor, broadcast standards, and television producer for the National Broadcasting Co. for 18 years.

I would like to thank you for the invitation to speak to you today on behalf of American Women in Radio and Television. I am the president of AWRT. AWRT is a national organization of professionals working in the electronic media and allied fields. It strives to promote the advancement of women working in the communications field and to uphold the high standards of the industry.

AWRT is pleased to have the opportunity of expressing its strong support for the passage of S. 1917, a bill introduced by Senator Packwood, which would preclude regulation of the content of broadcast and related communications by the Federal Communications Commission.

We believe that passage of legislation which would give broadcasters the same first amendment protection enjoyed by their fellow journalists of the print media is long overdue. AWRT agrees that democracy requires the press to be free from content regulation, and passage of S. 1917 will make that democratic imperative a reality for broadcast stations as it is for newspapers and magazines.

AWRT agrees with the findings detailed in section 2 of the bill. As broadcasters, our members know that the chilling effect of the current system of regulation is not a threat but a reality. The requirements of, for example, the political, editorial, and candidate endorsement policies of the Commission effectively inhibit many stations from expressing their positions on public issues.

This deprives the public of both the informed view of those who have given much attention to the issues and of an alternative to the views of the print media. In the growing number of communities, including many major cities, served by only one newspaper, this lack of alternative media views seriously disserves the public interest.

While we recognize that these particular policies are under examination by the Commission, their chilling effect remains while they are pending, and other policies have similar effects.

AWRT believes that passage of S. 1917 will encourage vigorous debate concerning public issues. In our information hungry age, when advertising time during local television news shows may command a higher price than all other nonnetwork time, there is little likelihood that broadcasters will ignore the public's need for news and information.

The number of broadcast outlets has multiplied since the Fairness Doctrine was promulgated, and technological change is now making available many more conventional broadcast and alternative media outlets. In an era experiencing such an explosion in the number of media outlets, there is no place or need for content regulation by the FCC.

AWRT strongly endorses S. 1917 and its elimination of the Fairness Doctrine and political broadcasting, cablecasting rules, and its preclusion of all FCC examination of station programming. Passage of S. 1917 will permit broadcasters and the operators of new communications media fully to exercise their editorial discretion to provide the best possible service to the public.

I thank you.

The CHAIRMAN. Thank you.

Mr. Bell, let me pose a question to you, then the broadcasters can answer if they wish. You are one of the few people who touched upon the advertising aspect of this bill. Let us use the Mobil ad for a hypothetical. It is a normal free enterprise ad, like you see in the Wall Street Journal. It is not aimed at any particular issue or any issue directly before Congress, but indeed it is a pro-free enterprise, we think competition is good for America ad.

One, will television stations take it? Two, if they do take it, what obligation do they have to offer something either in the way of a paid response or a free response to that kind of ad?

Mr. BELL. You are quite right that that is the issue. In fact, Mobil ads are a good example, because Mobil has been a strong advocate of the right to buy time to express direct views. But take the lesser case. The example you are addressing is a general institutional ad in which they talk about——

The CHAIRMAN. But they are clearly representing a free enterprise viewpoint.

Mr. BELL. Right, but not even taking a strong viewpoint on an energy issue, merely going on the air or trying to buy time to talk about the policy of their company to serve the United States or the free enterprise system automatically raises the controversial issues question.

In their case in particular and in the case of similar companies on issues like energy and environment, by and large, the broadcasters have turned those down. In fact, there is an extensive report which I happen to have here by Mobil, 10 case histories of theirs where they tried to get access to express their point of view. By and large, now the policy would be to say that could raise an issue of public controversy, and I think, under the policy of the law, the broadcasters would be required to give time free of charge to other opposing points of view, and it would place the broadcasters in a very difficult position to determine which are the responsible opposing points of view if there were any.

So that there has been an inhibition there to many advertisers. Many more than now try to run paid ads as Mobil does in a lot of newspapers, many more would do so, but I am sure their attorneys say there is no point in trying to offer your advertisements with your company's position on the issues, or even how your company operates in general, in light of the Fairness Doctrine restrictions. So I think they are discouraged from even attempting to advertise.

The CHAIRMAN. As I recall, with the networks, Mobil even offered to buy the time for the other side. They were still turned down because the networks were not quite sure who, and how many would get to respond. If you pick the wrong group, some other group complains. So they just said it was not worth it.

Let me start with you, Ms. Kaplan, and go down the line. What would you do at your station if you got an ad like that?

Ms. **Kaplan**. Well, it depends. Generally we will either turn it down and say do not bother or occasionally, depending on what the situation is, run it and then go out to do something else dealing with achieving the other point of view, as many of the other points of view as possible. There is not a great deal of that in radio. There are ads on issues that deal with referendums and issues. There is not a great deal of the Mobil situation in radio, but there is more of the issue purpose.

The **Chairman**. I believe there would be a lot more if you did not have to worry about providing response time.

Ms. **Kaplan**. There is no question, a lot of that, and the ability to go pursue it, which absolutely does not exist now. I mean, I do not even let our sales department pursue political advertising. It is handled by a separate person, because the mickey mouse that is involved is incredible in the process.

The **Chairman**. With our ads?

Ms. **Kaplan**. With your ad.

The **Chairman**. Ms. Crisman, do you have the same opinion?

Ms. **Warrick-Crisman**. We would be inclined to steer away from it because of the problems just suggested.

The **Chairman**. Eddie, what do you think, based upon your days as a broadcaster?

Mr. **Fritts**. Well, I still have a few of those days left, Senator, I certainly hope. We have a few stations under our banner, but those types of ads, the advocacy ads, do trigger greater responsibility and a more far reaching thought process than a normal commercial advertiser would trigger. I suspect that in our individual stations, that it would cost more for us to try to find the opposing view than it would to air the ads to begin with. Consequently, most stations or smaller stations find it not even worthwhile to consider it, and normally just reject it and go about their business.

The **Chairman**. Ed.

Mr. **Godfrey**. Off the top of my head, I cannot speak to the management of the station on this, but in past experience I know we would carefully look at it and probably would steer away from it. There are many stations around the country now that accept advertising from not only political candidates but also issues. I know of cases where an issue group has bought time during a campaign. News departments have actually been forewarned that they are going to have to carefully cover the other side to make sure that at least that opposing viewpoint had been on.

The **Chairman**. As I understand it, you do not have to give ad for ad, but you have to cover the other side. If you do not, you have to be prepared to give away some time.

Mr. **Godfrey**. Absolutely. Naturally, the sales department would find it easier for the news department to get the opposing view than to give away that time.

The **Chairman**. So the news department in essence says, why just not take the ad and we will all be better off.

Mr. **Godfrey**. Yes.

The **Chairman**. So the public is served less rather than more.

Mr. **Godfrey**. I would say so.

The **Chairman**. Eddie.

Mr. **Fritts**. Senator, I think it goes beyond just giving ads away to the opposing view. Under the current rules, broadcasters have a responsibility to seek out the opposing views, which are not always easy. As you said earlier, oftentimes a station puts itself in jeopardy by not choosing the proper opposing viewpoint, if you will, as sometimes there are multiplicities of viewpoints.

The **Chairman**. If I were a station manager, I do not know for sure who I would go to for a response to a free enterprise ad.

Ms. **Kaplan**. Well, you would have to go to more than one place, is the point.

The **Chairman**. You're right, you would have to go to more than one person.

Ms. **Kaplan**. That is right, and when you get into the candidate issue of endorsements, you totally stay away from any multiseat situation because you end up giving away to the opponents the sum total of all those who you have endorsed.

The **Chairman**. There were 9 or 10 candidates running in the primary, they would have to give time away nine or ten times.

Ms. **Kaplan**. Even if it is not a large race, if you are dealing with a county commissioner on a local basis, which is not districted, or the seats that are at large, then even in a normal-sized race you stay away for that very issue.

The **Chairman**. Your problem is, Where are the local issues? You are likely to have more candidates running for the city council or mayor than you are running for Governor or the U.S. Senate.

Ms. **Kaplan**. And the importance to cover it is more on the national level, because you are the only ones covering.

The **Chairman**. Picture the situation you would have had in the senatorial race when you endorse one candidate and the other 30 candidates want time. Clearly you will not endorse a candidate. You will not have any head-to-head debates. You will not have anything. You will cross your fingers and pray that your news judgment as to whom you cover is not challenged. You would say that coverage is news and hope you get away with it.

Those are all the questions I have.

That will conclude the hearing. I appreciate all your time.

[Whereupon, at 11:51 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF EUGENE W. WILKIN

My name is Eugene W. Wilkin. I live at 25911 Avenida Cabrillo, San Juan Capistrano, California. For more than two decades I struggled to learn the business of broadcasting, and to achieve standing as a successful member of that industry. My record is available for your inspection and it covers a "hands on" career in radio, television, film production and syndication plus the last ten years as a Consultant to a wide variety of industry clients.

The main reason I became a Consultant, and to thus run my own life and enterprise is rooted in the complete destruction of my broadcast management career by forces well beyond my control.

The individual who submits this document is "the Accused". For I was accused by the Federal Communications Commission of violating the Fairness Doctrine; both as an individual, and as general manager of the KREM station in Spokane, Washington.

These accusations were multiple; the foulness of my deeds covered such things as "conspiracy" and other unworthy actions.

As a result of these alleged violations my heresy became common knowledge at the time and tagged me forever "controversial". It also blew away my life in Spokane and again reduced me to zero financially. So much for the "climate" under which I offer this testimony.

The facts of this Fairness Doctrine violation while in Spokane are quickly related. As manager in television administration, there is always a high pile of "paperwork". Addressing myself to that one morning prior to 9 AM staff meeting, the temporary receptionist came into my office and said "They're ready for you know. . .".

I replied "Okay . . . who are 'they' and what do they want?". "It's the F.C.C." she says, smiling sweetly. As you know, broadcasting is an emotional business. I assure you nothing could raise my hair any higher than to be told members of a regulatory agency are in your conference room, and, in this case had been there for at least two hours.

You could easily hear the sound of my boots as I went to the other end of the building. Walking into the room, two men at my right stood up and in one motion produced identification and stated "We're from the Federal Communications Commission . . . sit down."

I guess I could have pleaded the Fifth Amendment; or called an attorney, or shifted it all to the headquarters of KING Broadcasting, the parent of KREM-AM-FM-TV. But—I did not. I am a very "square" middle-American type; wore my country's uniform twelve years and have played the game straight. So—I answered all their questions read from a prepared list, and learned the following:

1. "You, Eugene W. Wilkin are quilty of violating the Fairness Doctrine and we are simply here to pick up the evidence."
2. "We have subpoenaed your station logs for the past three months and they are there (pointing) on the table."

I was then read a list of these "violations" including conspiracy and two dozen other transgressions. Over the next three and one-half years. I became the central issue in a gestapo-like inquisition that prevasively occupied the best part of every day.

In the process it included such things as the company attorneys, understandably, scrubbing my insides with brillo pads looking for even the tiniest piece of rotten meat; to find it before the F.C.C. did and prepare a defense.

At this point you may wonder—what was all this about? About a month before the F.C.C. investigation started, again I'm in the office and I hear a commotion outside. Muffled but audible a voice says "I want to talk to the manager and now . . .".

I got up and went to the noises. Four individuals stood there with one spokeman saying "We want to go on the air from your studios right now in rebuttal to your editorial stand on EXPO '74."

My reply was "Fine. We'd be happy to air your opinion. May I see your identification, your bona fides, since you state you are speaking for all the environmentalists in the area?"

After very brief discussion they told me "We'll be back with that."

There endeth my association with what later turned out to be a "splinter group" of eight neighbors who had just broken off the major environmental organization to form their own ad hoc committee.

Some background here briefly. KREM had taken a strong stand with respect to EXPO '74; always including the disclaimer asking for other opinions. For three years we had done this ranging over many topics of local and state interest. One has since had national repercussions.

KREM took a view that the last 51 miles of the Columbia River should be left pristine. We really did not need "another dam dam". In the process we felt adding *more* nuclear power plants unwarranted; we applauded the existing operations but additional ones at high cost seemed unfeasible. The demise of "WPPS" otherwise known as "Whoops" leaves considerable frustration in my heart. But broadcasters must be trusted to exercise reasonable judgment when it comes to controversial issues. In my case, and over the near four years of promises of dark government dungeons for my "crimes" there is no question that being found culpable would have served to shore up the Fairness concept as administered by the Commission. There is an interesting end to this story. On a visit to the Capitol some months after KREM's license to operate was quietly renewed, I spoke with one of the inquisitors who had examined me in behalf of the F.C.C. When I stated, and most sincerely "Do you have any idea what that four years did to the members of the KREM staff much less me? And that for the second time in my life I played the lead role in 'Gone With the Wind'?"

He answered in the classic mode. "But" he says "We didn't find anything . . .".

Then he did a curious thing, perhaps genuinely based on feeling sorry for me. He took out a small card from his shirt pocket over his heart on which I gather the various "G" pay scales were noted. "You were making about 30 thousand as I remember" he states. "Yes" I said. "Well (as he writes on a slip of paper) take this down to the office number noted and tell them I sent you." At that point I didn't know whether to hit the SOB or cry out like the wounded Gaul. I did neither. I simply got up, said "Thank you" and walked away.

Senator, and members of the Committee, I submit the time is long past due for individuals like myself to exercise our Constitutional rights in full. Let the marketplace determine the course of events. Let the standards of the broadcaster, proven over the years to be substantially higher than any government "minimum" be the guiding force. Strike down this ugly regulation before zealous hands commit another atrocity as related in this Statement.

Positions Held "In The Public Interest" by Eugene W. Wilkin During period as general manager KREM-AM-FM-TV Spokane, Wn.

1. President: Inland Empire Dartmouth Club.
2. Vice President: Spokane Chamber of Commerce.
3. Founder: Spokane Broadcasters Association.
4. Vice Chairman: United Way of Spokane.
5. Board of Directors: Spokane Community Health Center.
6. Chairman: Citizen's Advisory Committee, Dept. of Social & Health Services, State of Washington (Statutory).
7. Governors Committee on Voluntary Programs (State of Washington) (Statutory).
8. Whitworth College Advisory Board.
9. Board of Directors: EXPO '74.
10. Board of Directors: Spokane Symphony Society.

Additional assignments accepted over a 25 year broadcast career submitted on request.

JOINT STATEMENT OF U.S. CONFERENCE OF MAYORS AND NATIONAL LEAGUE OF CITIES

For many decades our national policy has mandated that the award of a broadcasting license creates a public trust under which the licensee is required to serve the public convenience, interest or necessity. Thus the privilege of using scarce radio frequencies is conditioned, in part, upon the undertaking by licensees that they will "devote a reasonable percentage of their broadcast time to the consideration and discussion of public issues of interest in the community served by that particular station." To do so was thought to be in the public interest.

The legislative proposal here under consideration would terminate that public trust and eliminate the requirement that a licensee must disseminate the news and ideas concerning the vital public issues of the day. To do so would not serve the public interest.

In brief, the business of the National League of Cities and the United States Conference of Mayors is to enhance the performance of municipal government. To that end we speak to the various functions and concerns of city officials who, under our political system, are charged with the responsibility for producing effective city governance.

There exists an obvious, elementary and inescapable relationship between the quality of city governments, the competence and performance of city officials and the essentially political process that puts these officials in place and guides their activities. And it is a truism to acknowledge as we all do, that positive results from our political processes are dependent upon a well informed and active electorate. Our Supreme Court has put the proposition succinctly: ". . . Speech concerning public affairs is more than self expression; it is the essence of self government." Without the comprehension and understanding (as well as the participation and support) of its informed citizens, competent municipal government becomes a less likely prospect. If it happens, it simply is a matter of good luck.

The proposal here under consideration to relieve broadcast licensees of their obligation to report the community's news and to do so in an honest and balanced fashion, is a proposed federal policy to rely on luck. Given the vicissitudes of luck we have concluded, and so urge this Committee that such a policy is not in the public interest.

With limited opportunities available for face to face dialogues between citizens and city officials, municipal leaders are dependent upon other traditional means for fostering discussions and understanding of a given city's circumstances. It is the print media, newspapers and other periodicals, and the broadcast media, radio, TV and perhaps in due course, cable, which must support the essential exchanges on public policies between citizens and their elected and appointed municipal leaders.

It is revealing to consider the circumstances of the thousands of local governments spread across this nation. The New York Times and the Wall Street Journal do not keep citizens informed as to what is taking place in their respective local governments. Nor can state or even "local" newspapers, which are dependent upon broad areas of circulation for their survival, adequately inform citizens of each and every community as to what his local government is doing and why. Accordingly, the efforts of the print media must be supplemented by those of the broadcast media if our network of local communities are to be accorded the protections and benefits of an informed citizenry.

In this context let us consider the reality of the broadcast media. The National Association of Broadcasters tells us that in our almost 85.4 million households, 98 percent are television households and 99 percent are radio households. As a result, they say, radio delivers the news first in the morning to 56 percent of adults; television is regarded as the source of most news by 65 percent of the public; and television is considered the most believable news medium.

These impressive statistics tell us something more than when and where our citizens get the news. They suggest that our national policy of requiring broadcasters to present balanced versions of the news has been a relevant and effective policy. If, as the Supreme Court has said, information on public affairs is the essence of self government, if a broadcast license is a privilege granted to a very limited few, and if this privilege is to be bestowed in the public interest then why is it not appropriate to demand that a licensee serve the public convenience, interest or necessity? And if under our present federal laws and policies our citizens have come to rely primarily on the broadcast media for essential information on public affairs, what public interest is to be served by abandoning the policy that privileged broadcast licenses be required to present that news, and in a reasonable and balanced fashion.

In the view of city officials, such a policy switch seems both irrational and contrary to the public interest.

There is another aspect of the proposal to abandon our heretofore successful policy to require the broadcast licensee to provide adequate and balanced coverage of issues of public importance which is of particular concern to local government officials and merits discussion here.

The Census Bureau tells us that in the United States we have about 19 thousand municipalities and townships of which 18.6 thousand have a population of less than

50 thousand people. Each of these communities manifest its own unique versions of municipal affairs. Given these numbers, particularly when measured against the characteristics of today's media, with print perhaps in a decline and broadcast seeking freedom from the obligation to cover the news, it seems foolhardy, when viewing these changes from the perspective of municipal governments affairs, to assume that our citizens either will continue to be well served by the media or well informed on public issues.

But even if (as the legislation under consideration does) one assumed that the public was by and large adequately enlightened on municipal matters, consider the circumstances of a responsible local government official (who understands and believes that informed citizens are essential to effective government) who finds either the available broadcast media has ignored completely vital municipal issues, or even worse, has irresponsibly distorted those issues and unfairly attacked the responsible local officials and their actions. How in these circumstances, is this official supposed to achieve that informed public which is the essence of self government? What, in the public interest, should be his remedy, if any?

Under existing federal law, if the offending media is a broadcast licensee, that federal law contemplates a remedy, a course of action which a public official can pursue in seeking an informed citizenry. This, of course, is the so-called Fairness Doctrine which the proposal before this Committee seeks to abolish. If this were adopted, our municipal official in the circumstances described above would be without recourse.

If it is true that a well informed citizen is the foundation of successful self government, then it is not in the public interest to abandon a long standing and successful federal policy which for many decades has supported that principle.

It is not the intent of this statement totally to ignore the difficulties of administering equitably a federal communication policy which seeks to perpetuate such ephemeral qualities as balanced news coverage and unfair commentaries on official actions of public administration. These difficulties are substantial.

But it is our conclusion that despite these difficulties the public interest is better served is a standard of responsible performance in these matters is imposed upon the beneficiaries of an exclusive broadcast license. It is a priviledge which must carry with it balancing responsibilities. It is preferable to have a relevant policy, difficult to administer, which serves the public interest then to abandon that intertest serving policy in favor of administrative simplicity. Too much is lost if broadcasters are relived of the requirement that they serve the public as well as themselves.

STATEMENT OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

Mr. Chairman: The Anti-Defamation League of B'nai B'rith welcomes this opportunity to express its views on the "Freedom of Expression Act" (S. 1917), introduced October 3, 1983 by Senator Bob Packwood. ADL has consistently supported the right of all Americans to exercise the freedom of speech guaranteed by the First Amendment. It is an extension of this longstanding position that prompts us to oppose the bill at issue before the Committee.

Since its inception, over 70 years ago, the League has been cognizant of the special concerns raised by the First Amendment. ADL was founded, according to its charter, "to stop, by appeals to reason and conscience, and if necessary, by appeals to law, the defamation of the Jewish people. Its ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and riducule of any sect or body of citizens." This objective has been translated into educational programs and legal efforts by the agency on behalf of all minority races and religions.

In its efforts to abolish discriminatory treatment of minorities, however, the League has been firm in its support for and reliance upon the First Amendment. Rather than silencing or censoring the bigoted voices, ADL has attempted to change discriminatory attitudes, to educate the prejudiced, and to present a fair and objective picture to the public. History has taught us that tools of suppression and restriction merely fan the flames of bigotry. For this reason, ADL has relied on the power of broad and open public debate, believing that the interests of a democratic society are best served by the free exchange of diverse ideas.

The fairness doctrine; the equal time rule and the reasonable access provision of the Communications Act of 1934, which would be abolished by S. 1917, have been instrumental in promoting that free exchange of diverse ideas within the context of the broadcast medium. Recognizing the technological need for licensing restrictions, Congress established a "public interest" standard for regulating the airwaves which maintains a balance between efficient use of a limited natural resource and the licensee's right to broadcast programming of his or her choice. The scheme created by Congress has served as the least restrictive means of preserving these varied interests.

Public access rules, far from infringing on First Amendment freedoms, guarantee the diversity of opinion envisaged by the framers of the Bill of Rights. The free and open discussion of differing views is more than protected under the First Amendment, it has been called the essence of a democratic self-government. Broadcasters retain complete control over programming content, and may broadcast any view on any issue; federal regulations merely ensure that after a broadcaster has spoken, contrasting views will be heard. The broadest discretion is granted the licensee in complying with these regulations, in terms of when opposing views are presented, the spokesperson and the amount of air time devoted to the presentation.

Proponents of S. 1917 have cited technological advances in broadcasting as grounds for removing FCC regulations over the broadcast media. The proliferation of new cable stations, video communications and low power radio and television stations is offered as proof that government regulation is no longer necessary to ensure that a wide variety of information reaches the public. In *Red Lion Broadcasting Co. Inc.* v. *FCC*, the Supreme Court specifically rejected this argument, noting that more effective utilization of the electronic spectrum had been developed concurrently with applications for its use: "Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which wise planning is essential."[1]

The development of new media is no guarantee of public access. Cable companies are under no obligation to offer public access channels for community use. Widespread use of video telecommunications is still very much in the future. Although technology has opened up new regions of the broadcast spectrum, even the advent of these future developments will not lessen the need for fairness obligations on the medium. The multiplicity of broadcast transmission is no guarantee that issues of particular importance to a community will reach the public's attention. Adding more voices to the airwaves, while increasing competition for commercial sponsorship and originality in entertainment programming will not necessarily increase the information the public receives on political candidates and concerns.

Thus, practically, technological progress has little impact on the public access. Public interest requires that federal laws mandating fairness in broadcasting must be maintained.

Other proponents of deregulation have argued that competition among broadcasters and the public can be relied on to replace the current "public interest" standard with a more effective "marketplace" approach to the electronic media. Strict reliance on the market theory, however, poses serious risks which are not present in the traditional public trustee approach. First, the marketplace is an imperfect creature; it is not a panacea for the perceived disadvantages of government regulation. Under the market analysis, a decrease in listeners will influence the broadcaster and convince him to be more responsive to audience preference. For example, if the public decides a radio station is airing too many commercials, they will let the broadcaster know by turning off the station. This listener preference, as the theory projects, will be reflected in the station's ratings and, ultimately, the station's commercial revenue, forcing the broadcaster to reevaluate his or her programming. In the absence of federal regulations, however, competition in the market may well increase commercial levels in the entire listening area. Will a disapproving public have adequate recourse? Leaving regulation solely in the hands of individual listeners and competitive broadcasters is ineffective.

Second, there is little evidence to support the belief that broadcasters will, on their own initiative, voluntarily sacrifice lucrative sponsored programming for the amount of air time necessary to keep the public informed on important controversial issues. Even under current regulations, most broadcasters devote the bare minimum of airtime to fulfilling fairness obligations, often airing public affairs programs during the middle of the night or on Sunday mornings, rather than sacrificing lucrative "prime time" periods.

Third, it is asserted that elimination of the fairness doctrine and federal guarantees of public access will promote diversity in broadcasting; in fact the opposite is true. Broadcasters, cognizant of their responsibility to the public as licensees, are obligated to devote a reasonable amount of time to issues of public importance, as enunciated under the fairness doctrine. The legislative proposal before this Committee, in conjunction with other deregulatory steps by the Federal Communications Commission, will serve only to decrease the variety of information which reaches the public.

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[1] 395 U.S. 367, 399 (1969).

For example, in efforts to deregulate broadcasting, the FCC is considering the elimination of multiple ownership regulations which will add to the increasing concentration of ownership of radio, television and cable stations. As a consequence, regardless of the number of broadcast stations, we will be hearing from a smaller group of broadcasters, therefore decreasing diversity. Moreover, simplified licensing applications and renewal forms and longer licensing terms make it more difficult for the Commission to determine if the licensee is operating in the public interest. Such revisions make FCC oversight more difficult and lessen the broadcaster's oblitation to be responsive to community needs.

Federal regulation broadcast media is a necessary means of preserving First Amendment values for all citizens. In rejecting a challenge by broadcasters to public access rules in *Red Lion*, the Supreme Court reaffirmed this principle, pointing out that it is consistent with the "First Amendment goal of producing an informed public."[2] The Court continues:

"Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agree. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. 'Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.' " [citation omitted] [3]

The Anti-Defamation League, a firm advocate of the First Amendment's free speech guarantees, welcomes this opportunity to affirm its support for the fairness doctrine, the equal time rule and the reasonable access rule as effective and constitutional tools for balancing the interests of varying societal groups and maintaining an educated, informed voting public.

STATEMENT OF THE AMERICAN JEWISH COMMITTEE AND THE AMERICAN JEWISH CONGRESS, WOMEN'S AMERICAN ORT, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, AND UNITED SYNAGOGUE OF AMERICA

The American Jewish Committee (AJC) is a national organization of approximately 50,000 members dedicated to the protection of the religious liberties and civil rights of American Jews. It has always been the conviction of this organization that this goal can best be accomplished by working to preserve and promote the constitutional rights of all Americans.

Specifically, AJC is committed to the belief that the free flow to diverse ideas and information and informed discussion of issues of public importance, which lie at the heart of the First Amendment to the United States Constitution, are fundamental to a robust democratic system. AJC has attempted to facilitate this principle through the widespread dissemination of our research and policy studies on critical public issues and the encouragement of open discussion on those issues.

We are joined in this submission by the following organizations, all of whom share our commitment and concern on this issue:

The American Jewish Congress is a membership organization of American Jews founded in 1918 dedicated to promoting the civil liberties of all Americans.

Women's American ORT, founded in 1927, with a current membership of 145,000, is the largest of membership organizations in forty nations which support the global ORT vocational and technical education program operating in twenty countries on five continents.

The Union of Orthodox Jewish Congregations of America is the central spokesman and service organization for 1000 synagogues across the U.S.A.

United Synagogue of America is the congregational arm of the Conservative movement representing 830 congregations in the United States and Canada, with a membership of 1.5 million.

We submit this Statement for consideration by the Committee because we believe that the existence of a fully informed citizenry, able to participate intelligently in the public debate arena, would be seriously jeopardized by the repeal of the "Fairness Doctrine" embodied in Sections 312(c)(7) and 315 of the Communications Act of 1934. We fear that the points of view we hold and the information we have to offer on important public issues of concern to the Jewish community might not be effectively aired in the absence of such an obligation on the part of the media. For these reasons, we are opposed to S. 1917.

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[2] 395 U.S. 367, 392 (1969).

[3] Id.

The "Fairness Doctrine" requires that discussion of public issues be presented on broadcast stations and that each side of those issues be given fair coverage. It is argued by representatives of the broadcast media that this obligation inhibits free and vigorous debate and abridges the broadcasters' freedom of speech and press. Furthermore, it is argued that advances in electronic technology resulting in the increased availability of broadcast frequencies make the original arguments for regulation of the electronic media obsolete. We emphatically believe, to the contrary, that the rationale for such regulation, enunciated by the Supreme Court in 1969 in *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367 (1969), ("*Red Lion*") is equally as valid today as it was then.

As the Supreme Court noted, "[l]icenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them." *Red Lion*, 395 U.S. at 394. The privilege to operate a particular frequency carries with it an obligation to operate in the public interest. The reason for this obligation is the very nature of the airwaves. Notwithstanding the recent multiplication of electronic frequencies, only a small fraction of those who wish to communicate by broadcast may do so at the same time if intelligible communication is to be feasible. When there are substantially more people who wish to broadcast than there are frequencies to allocate, effective First Amendment broadcast rights are meaningless if the majority of citizens are precluded from access to the airwaves. Thus, the government may, and indeed should, require a licensee given the privilege of operating a certain frequency "to share that frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative if his community and which would otherwise, by necessity, be barred from the airwaves." *Id.* at 389.

Enforced sharing of the limited public airwaves is squarely consonant with the intent of the First Amendment to encourage uninhibited debate on public issues by a well-informed citizenry. The monopolization of an influential communication medium by a minority of citizens, and the utilization of that medium as a platform solely for the dissemination of partisan ends, inhibits the open marketplace of ideas. As our Founding Fathers clearly recognized, the best means of refuting obnoxious doctrine or abhorrent thought is through competition with opposing ideas, not suppression or censorship of the unpopular views. It is the very availability of a reply which makes tolerable the protection of the original utterance. The First Amendment right at stake in the issue at hand is not the freedom of speech of the broadcasters, but rather the right of the public to obtain suitable access to diverse ideas and experiences. As Justice White unambiguously announced, "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion*, 395 U.S. at 390.

Thus, the question presented by the "Fairness Doctrine" is not whether a station owner's freedom of speech s inhibited. Rather, the question is whether a private station owner licened to operate a scarce public resource may censor the speech of those deprived of licenses. We respectfully submit that the answer is, and should be, "no." "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. *Red Lion*, 395 U.S. at 392. The right of free speech of a broadcaster does not embrace the freedom to repress the same free speech rights of others. *See Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

The "Fairness Doctrine" encompasses several different duties, all of which are tailored to fairly balance the rights of broadcasters with the rights of the public. Licensees have an affirmative obligation to devote a "reasonable amount" of air time to the discussion of "controversial issues of public importance." Once broadcasters cover one side of a particular controversial issue, they must then also afford a "reasonable opportunity" for contrasting viewpoints to be heard. While this does obligate the broadcaster to actively seek out opposing viewpoints and to offer some free air time, if necessary, to accomplish a balanced presentation, the broadcaster also retains much freedom and flexibility in carrying out this duty. For example, he is not obligated to afford equal time for opposing viewpoints. Nor need he present the opposing views on the same program or over the same time period. Rather, he retains discretion to achieve balance within the context of his total programming schedule. The licensee also has considerable discretion as to the techiques or format to be employed and the spokesperson to be chosen for each diverse viewpoint. No single group or individual is entitled as a matter of right to be given air time to express his personal point of view.

There are two corollary duties imposed by the "Fairness Doctrine." First, a broadcaster is obligated to permit answers to personal attacks occurring during discussion of controversial issues. Second, a broadcaster must provide a reasonable opportunity for political opponents of candidates endorsed by the broadcaster to communicate their views to the public. Without such obligations, station owners might limit air time to communication of their own views on public issues, people and candidates, and could permit air time only to those with whom they agreed. The public would be handicapped in its ability to evaluate public figures and candidates. Again, however, these requirements are restricted in scope to maximize the broadcaster's freedom. Much programming is exempted from these duties, including bona fide newscasts, on-the-spot coverage of news and news commentaries and analyses.

Broadcasters argue today, as they did earlier in arguments rejectred by the Supreme Court in the *Red Lion* case, that broadcast stations should be constitutionally indistinguishable from metropolitan newspapers, which are not subject to the "Fairness Doctrine." However, aside from the difference inherent in a licensing system covering a limited resource, there are many imperfections in this analogy.

Broadcast stations, particularly television stations, have become primarily vehicles for entertainment rather than for news, information and discussion. The volume of controversial material in broadcasting is relatively small. Furthermore, the diversity of sources in the print media is vastly greater when account is taken of the multiplicity of trade papers, magazines, books, pamphlets, newsletters, hand bills and similar written sources.

It has been suggested that the broadcast media compete with the print media and, therefore, simply add to the diversity of sources. In fact, the electronic media have decimated the print media. Except for an audience of highly literate persons, they are not really comparable. For vast elements of the population who do not seek to actively inform themselves about controversial public issues, the broadcast media are the only effective means of communication. In parts of the country where only one local broadcast station may exist, this station then would become the sole source of information about public issues.

The multi-sensory effect of television influences this audience more strongly than the printed word. The appearance of a familiar personality with an authoritative manner and illustrative pictures reaches a different and larger audience than printed symbols which require effort to understand and analyze. Indeed, the vast superiority of television as a means of communicating advertising messages, including political advertising, is the primary cause of the decline of metropolitan newspapers.

Another fundamental difference is that a newspaper or magazine is a random access device from which one can select the sports, the comics or the editorials, while a broadcast program is a continuum from which one takes all or nothing. Broadcasters therefore tend to direct programming to the broadest possible audience and to give little service to minority tastes and needs. A metropolitan newspaper can set aside considerable space for minority interests (e.g., opera, ballet, bridge, chess, shipping, antiques, fashions, art, food, travel), without pressing such material on the majority or losing mass circulation. Television's need to retain the mass audience governs all of its programming, including public affairs programs. Television stations tend to avoid programming which will bore or offend the majority. This policy limits diversity of view. The dominance of networks over broadcast content is far greater than the effect of wire services on newspapers.

Finally, the audience of a network news program is vastly larger than the circulation of a metropolitan daily newspaper. In fact, the number of persons who actually read a particular news item within that newspaper is probably even smaller.

In conclusion, the "Fairness Doctrine" does not restrict or censor licensees from expressing any point of view. It merely promotes diversity through increased access to a variety of views in the discussion of controversial issues of public concern. It is through this requirement of balanced presentations on issues of public importance that the First Amendment interest in an informed public, capable of intelligently conducting its own affairs, best can be served.

The reality of our time is that public affairs programming in general is not lucrative and consequently, broadcasters are less than eager to schedule it. It is also true that some broadcasters who do cover the political scene simply do not do so objectively. It is necessary, therefore, that the broadcast industry be policed, fairly and firmly. The "Fairness Doctrine", broadly conceived and properly applied, is both the most effective and the least restrictive means of insuring that the public hears all sides of controversial public issues.

We respectfully urge that S. 1917 be defeated and that the constitutional principles embodied in the "Fairness Doctrine" be reaffirmed.

STATEMENT OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association strongly supports enactment of S. 1917. This legislation represents an important first step toward restoring for the people of our nation the freedom of the press intended by the First Amendment. For cable television, however, much more work will need to be done after enactment of this bill before cable may take its place beside broadcast and print media as an unfettered participant in the exercise or its fundamental, constitutional responsibilities.

The unparalleled regulation and restriction of editorial discretion forced on cable television already has been well-described for the Committee in earlier testimony from Trygve Myhren, Chairman of American Television and Communications Corporation; Barry Wilson, Vice President-Operations of United Cable Television Corporation; and George Shapiro, of Arent, Fox, Kintner, Plotkin and Kahn. NCTA would particularly emphasize to the Committee that the federal and local regulatory burdens described by Mr. Myhren and Mr. Wilson are not unique to their companies. They are, rather, poignant reflections of the extent of governmental intrusion into cable operator's First Amendment rights borne by the industry as a whole.

In large measure, the cable television industry suffers this derogation of constitutional protection because there has never been a comprehensive, national policy created to deal with cable television. Instead, a weedbed of cable regulations has grown up around the country. As regulations proliferated, federal and local policy makers increasingly paid more attention to the technology of cable than to the function of cable. Cable was new, and did not fit neatly into any of the regulatory models applied to other media.

Cable provides information in a video format, leading some to advocate broadcast-type regulation. Cable uses a wire for transmission of information, leading others to advocate common carrier-type regulation. Remarkably, policy debates about cable have focused mainly on *how* to regulate the content of information provided on cable systems, rather than on *whether* regulation was prudent—or even permissible—under the First Amendment.

In the early days of cable, it was the federal government that sought to control the editorial processes of cable television. Congress amended section 315 of the Communications Act to make the equal time provisions applicable to cable television programming. The FCC brought cable within the scope of the Fairness Doctrine. S. 1917 wisely would reverse these policy misjudgments and restore to cable operators much of the freedom intended for all the country's press by the First Amendment. NCTA stands firmly behind this effort.

Unlike broadcasters, cable does not make use of public airwaves. Equal time and Fairness Doctrine obligations are imposed upon broadcasters based on a theory of scarcity of electromagnetic spectrum. This rationale, to the extent it any longer has any validity, clearly is inapplicable to cable television. Cable delivers information—"publishes" it—using its own, private facilities. The only public resources used are the rights-of-way along which cable facilities are constructed. This use should provide no more rationale for content restrictions than use of public streets by newspaper delivery trucks should open their newsrooms to governmental control. S. 1917 would free cable from the broadcast-type regulations placed on it by the federal government. There is, however, a plethora of other regulations with which cable has been saddled, regulations equally repugnant to a strong, free press; but which lie beyond the scope of S. 1917.

During the 1970s, the FCC was not content to limit its incursions into the editorial operation of cable system to Fairness Doctrine and equal time restrictions. It also promulgated a series of rules which required cable operators to provide local origination programming, to provide public access capacity and facilities, and to lease channels on a non-discriminatory basis for commercial use by third parties. These rules were thrown out by the Eight Circuit U.S. Court of Appeals in *Midwest Video Corp. v. the FCC,* 571 F.2d 1025 (1978). This decision subsequently was upheld by the United States Supreme Court.

The appeals court found that the FCC rules not only violated the Commission's statutory authority; they also violated the First Amendment rights of cable operators. (The Supreme Court agreed that the rules exceeded the FCC's authority. It reserved the First Amendment question.)

In assessing the constitutional implications of the Commission's rules, the court decided that cable television could not properly be characterized as a broadcast or common carrier medium, but that it was more closely analogous to a newspaper for First Amendment purposes. NCTA believes that this approach not only is appropriate, it is constitutionally mandated.

Since the FCC's rules were finally overturned by the Supreme Court in 1979, the cable industry has found itself shackled with more, not less, regulations. The absence of FCC rules created something of a power vacuum which has been filled far beyond its original capacity by local government.

As this Committee is well aware from its deliberations on S. 66, cable television is the only medium of mass communications regulated at a local level. All of cable's competitors—commercial television, subscription television, satellite master antenna television, multipoint distribution services, direct broadcast satellites, and the rest—are regulated at the federal level, if they are regulated at all. It is important to note that these media, along with all of the print media, are today supplying the American public with a *greater* diversity of information sources than has ever existed at any time in our nation's history.

Under any theory of the First Amendment, the more diversity available to the public, the less need for any type of regulation of any source of information. Yet, against this backdrop, the regulation of cable's editorial processes has grown.

This situation is even more ironic given the nature of cable as a single medium capable of providing great diversity. In many markets, the only source of video programming, prior to cable's entry, was local broadcast television signals. Upon cable's entry, the diversity of information available to people in that community expanded dramatically. Yet, somehow through the introduction of this diversity, cable wound up subject to a wide variety of regulations and restrictions that would not be tolerable if imposed even on broadcasters.

Free access for public, educational, and governmental programming, and leased access requirements have become commonplace. Further, many cities have imposed themselves directly as censors of the editorial judgement of cable systems. Mr. Wilson's testimony relating how the city of East Lansing censored the cable operator and refused to allow the Christian Broadcast Network to be aired over the cable system demonstrates just how dangerously far local governments have insinuated themselves into the control of content of cable programming.

Until cable is shielded to the same extent as other media of mass communications from exercise of both federal and local governmental authority, cable will remain an orphan of constitutional protection. S. 1917 is an important beginning for the cable industry toward full freedom from government content control. As Mr. Myhren pointed out, cable consumers are forced to pay for this control. In a larger sense, however, the entire American public pays a price. Freedom of press and of speech is the bedrock upon which all of our other freedoms are built. With it, our free society is ensured. Without it, all of our other freedoms are in jeopardy. NCTA believes the time has come to begin, with S. 1917, to return the state or the law to its full and proper constitutional dimensions.

NCTA respectfully requests that this statement be made a part of the record of the hearings on S. 1917.

Association for Education in Journalism & Mass Communication,
University of South Carolina, College of Journalism,
Columbia, S.C., January 23, 1984.

Senator Bob Packwood,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

Dear Senator Packwood: Although I an unable to be with you this morning, I hope this letter can be entered into the committee record as you open your hearings on the Freedom of Expression Act of 1983.

As you know, the Association for Education in Journalism and Mass Communication, of which I am president, is on record supporting efforts to revise the content doctrine that denies full freedom of expression rights to broadcasting and other forms of electronic communication. The resolution of our 1983 national convention was as follows:

"Recognizing that the growth and convergence of technologies for the delivery of information do not change the essential nature of communications in a free society, AEJMC reaffirms that the public interest is best served where freedom from content regulation is protected regardless of the means by which information is disseminated. AEJMC welcomes the opportunity for its members to work with Congress in developing a comprehensive communication policy that promotes freedom of expression."

Although I am sure that there are diverse points of view among our members as to the specific provisions of the Freedom of Expression Act, I personally welcome this legislation as a step toward unraveling a terrible conceptual muddle that is inhibiting freedom of expression in America. Your bill proposes a new theory of the

First Amendment. It is not a perfect approach and does not solve all problems inherent in our old and outdated regime of broadcast regulation in this country, but it is an important step in that process. Your legislation is what the constitutional scholar Harold Chase used to call a proximate solution to an insoluable problem.

As a scholar who has produced several books about mass communication and who has engaged in advanced studies of communication law and such concerns as the public interest and the concept of representation, I believe that your bill will have broad and important implications for all of mass communication in America. It will prevent govenmental (and other) interference with a variety of content issues that could and have constituted censorship in the past. What you are doing is not simply an industry concern, but a civil rights issue that deserves the fullest support from the American people.

The preponderance of scholarly evidence suggests that the doctrine of scarcity is no longer an appropriate regime for broadcast regulation. The Freedom of Expression Act suggests a new approach. Unfortunately, the provisions of the bill have not been given any scholarly test, although our members stand ready to assist in that process.

Sincerely,

Everette E. Dennis, *Dean.*

Law Offices of John C. Armor, P.A.,
Baltimore, Md., February 16, 1984.

Hon. Bob Packwood,
Chairman, Senate Committee on Commerce, Science, and Transportation, Washington, D.C.

Dear Senator Packwood: I thank you for the opportunity to be a lead-off witness on this bill. It was both a challenge and a pleasure. You will be pleased to know, if you have not already heard, that Dr. Smith now has a commitment for publication of the case statement, and will be meeting with the publisher early next week. The Summary from that statement, together with the citations in the margins of early American newspapers, will be supplied to the Committee as the written remarks associated with my testimony.

I had the pleasure of watching the later days of testimony on C-SPAN, on the cable service in Baltimore County, Maryland. It was like Chinese puzzles within puzzles, to be sitting in the comfort of my own home, and see Professor Powe, and the others present their points about the breadth of television coverage in general, and cable in particular.

I was concerned about the implications, however, of the questions asked by Senator Pressler. His approach was that two wrongs don't make a right, and that the lack of enforced access in the print media did not justify the same pattern in the broadcast media.

It might be helpful in the hearings to include as an exhibit the log for a week of programming on an average cable system. Caltec, in Baltimore County, has only 32 channels. Still, they get into some pretty obscure and narrow-interest programming. I remember a program on the techniques for firefighters in dealing with tank fires, both land-based and rail, and both combustibles and chemicals. I found it interesting, although it would never in a million years make the network braodcasts.

Of particular interest would be the blank airtimes. Two channels here are turned over to Community Colleges, and most of the day they "broadcast" only their call letters (like major TV used to do when I was twelve—I still remember test patterns at noon). I've checked into it some, and the Colleges would be delighted to have almost anyone come forward with almost any subject, and use their directors, cameramen, and technicians in training. And, Caltec exercises no editorial control over those channels.

In short, the answer to the questions raised by Senator Pressler, and likely to be raised by others, is that with cable, and DBA will probably be similar, there is more airtime available than there are people and programs to use it.

I know about Mothers Against Drunk Driving, since that organization arose in large measure in this state. The Senator's question is whether they could get airtime. The answer is practical, and an emphatic yes.

An actual log, not only of what was broadcast, but of the airtime that went begging, would go a long way towards allaying the fear of those who are concerned with access.

The issue you are dealing with is both fundamental and critical. And, as you have pointed out, along with such witnesses as the President of Knight-Ridder, it is a question which will force its own answer as technology blends the print and electronic media into a single continuum. Because I firmly believe in the value judgment made by the Framers in the First Amendment, and because I believe the same judgment should be applied to the communications media of the 20th century and beyond, I hope to be of future service to you in this effort.

Cordially,

John C. Armor.

Federation of American-Arab Organizations,
New York, N.Y., March 8, 1984.

Mr. Dan Phythyon,
Senate Commerce Committee,
Hart Building, Washington, D.C.

Dear Sir: Please enclose the following statement in the records concerning Bill S 1917.

"The Federation of American-Arab Organizations, established in 1967, and representing 27 organizations concerned with American-Arab relations and the presentation of the Arab cause to the American people, believes that the so-called "Fairness Doctrine is neither fair nor constitutional.

"Fairness" must be determined by human beings. A government bureaucrat has no greater awareness of or committment to "fairness" than a journalist who is committed to his profession and craft. Indeed, we would rather choose the judgment of a journalist and his concept of fairness than that of a government authority.

On the constitutional grounds, the First Amendment's prohibition that "Congress shall make no law. . .abridging the freedom of the press" means that there should be no government interference with the freedom of the press, print or electronic journalism. The field of electronic journalism should have the same protections of the First Amendment as print journalism. *Near* v. *Minnesota,* 283 U.S. 697 (1931) should apply in both cases.

While opposed to the so-called Fairness Doctrine, we must mention the unhappy fact that American news media, print or electronic, have not been, by and large, fair with the Arabs and the Arab cause, despite the FCC and its "Fairness Doctrine". The situation cannot become any worse and it may even improve as the journalists recognize their commitment to a higher standard of professional excellence."

We disagree with much of Senator Bob Packwood's position on the Middle East, but appreciate his defense of the Constitution.

Respectively,

Dr. M. T. Mehdi, *Chairman.*

Federal Communications Commission,
Washington, D.C., March 14, 1984.

Senator Bob Packwood,
Chairman, Committee on Commerce, Science, and Transportation, Senate Russell Office Building, Washington, D.C.

Dear Senator Packwood: Last month you held hearings on S. 1917, the "Freedom of Expression Act." You know of my affinity for your position that the electronic press deserves the full First Amendment protection accorded the print press.

Although I did not testify before your committee, I would like to contribute my thoughts in this written form with the desire that you include this letter in the record you are building in support of the bill. I have given this issue significant consideration and attention during my tenure at the Commission and I am convinced that we need to institute the print model for the electronic press.

The essence of the print model for the electronic press is that the electronic media should be subject to the same regulations—or, more appropriately, absence of regulation—as are the print media. The objective is to remove the artificial distinction between electronic and print media. The effect is to expunge the bald notion that electronic media were bestowed only partial rights of free speech and press under the First Amendment. The result is that the walls of regulation which surround and restrict broadcasting will crumble.

To restore this parity for the electronic press, the Congress and the FCC must depart from the "public trusteeship" model for broadcasting which resulted from the original spectrum barter: in exchange for use of the "scarce either," broadcasters were required to provide services to the public which the government (without regard to broadcasters' discretion) deemed necessary. Forty years ago, this trade-off might have seemed proper; today it is archaic.

The "scarcity" basis relied upon originally to deny First Amendment protection to the electronic media no longer comports with the present circumstances in most American cities and towns. Simply put, newspapers are scarce; in relation, broadcast outlets are abundant. Moreover, there's no mention in the Constitution or anywhere else that the framers undertook "scarcity analyses" of the print medium in the late 1700's, or that they expected us to undertake them today as new methods of distributing information emerge.

Nor should the electronic press be distinguished under the First Amendment because it has a greater "impact" than do print media. The electronic media have a great impact to be sure, but they're not unique in their influence. Moreover, at the time the First Amendment was adopted, newspapers and leaflets had a significant impact—one which led to hostility by political opponents, as illustrated by the Alien and Sedition Acts. If we regulate only the most pervasive media, we favor the bland over the daring. In so doing, we may end up stifling the very expression which most—rather than least—needs protection.

The courts have treated electronic and print media alike in most areas of law affecting the press, including defamation, privacy, and protection of news sources. The detour from this straight path toward full First Amendment protection for the electronic press comes from the decision that listeners and viewers have rights to hear and see suitable expression. *See, e.g., Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 395 (1969).

But the burgeoning electronic marketplace of ideas now provides a means to tear down the roadblocks between the electronic media and the First Amendment. Allowing the electronic press to respond to marketplace forces resulting from this active and developing marketplace is consistent with both the broadcasters' and the public's First Amendment rights. In basing their content judgments on their perceptions of demand—responding to the marketplace forces reflecting the audience's choices—the electronic media conform their programming to the interests of listeners and viewers. The electronic press maintains its discretion while listeners' and viewers' interests remain paramount.

Because the media are indistinguishable in relevant characteristics, the electronic media deserve the full protection afforded by the First Amendment which the print media now enjoy. More important, the public deserves an electronic press protected by full Constitutional rights.

The "trusteeship model" we're leaving behind is inappropriate for several reasons. First, the protectionism inherent in the quid pro quo of the "trusteeship" model inhibits innovation, development of communications, the true competition. Second, the requirements and restrictions imposed on broadcasters create a false "public interest," constructed principally on proclamations of unelected bureaucrats. The layer of governmental programming decisions prevents broadcasters from responding to their markets, or, at least, distorts those responses; the result often has been merely a different mix of programs, not necessarily a better one, or one the audience wants or needs. Third, the "trusteeship" model fails to account adequately for the First Amendment protections guaranteed to all the "press," since most of the licensees' discretion is removed and government mandated types and amounts of programming are substituted.

By leading away from the "public trusteeship" model, we are *not* abandoning the "public interest;" rather, we simply are recognizing that broadcasting aimed at capturing the public's interest also generally serves the "public interests." The public interest served by the electronic press operating under the "print model" will be the public's true interest. It won't be a public interest defined and manufactured by paternalistic governmental proclamation. Government should not be allowed to make programming choices for the American public; nor should it be allowed to make choices that "chill" the public's choices.

Restoring the freedom of speech for the electronic press will not have an adverse effect on services rendered by broadcasters as a group or market-by-market. The number of broadcast voices in most communities is large enough to ensure that competition can result in full service. Market demands often have led broadcasters to serve the public in excess of FCC requirements. For example, while the FCC traditionally had been concerned about the amount of news programming, all-news radio—and now, all-news cable television—have emerged and, are growing strong.

In Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207 (1982), we carefully and thoroughly examined the legal bases for providing this full First Amendment protection to the electronic press. We concluded that the Communications Act provides the FCC the discretion to remove the content regulations we now impose on broadcasting and other electronic media. The Congress can, and should, eliminate the rest.

The litmus test for regulation of the electronic press is straightforward: hold the regulation next to print "regulation." Would it be permitted for newspapers, periodicals, and books? If not, the regulation should be eliminated.

It's easy to discern the types of regulation that would fail such a test: content regulation (e.g., specified guidelines for news, public affairs, and other non-entertainment programming); the fairness doctrine, political broadcasting rules and other access-based requirements; ownership restrictions beyond antitrust concerns. Interference protection and many technical regulations, of course, would remain.

The fairness doctrine and other access regulations provide the easiest case. There, the Supreme Court itself held the litmus. In striking down as unconstitutional an access requirement imposed on newspapers, *Miami Herald Pub. Co.* v. *Tornillo,* 418 U.S. 241 (1974), the Court sent a clear statement which no longer can be ignored for the electronic press.

The process works equally well if we consider the government dictating for newspapers any of the content regulation now throttling the electronic press. It would be inconceivable—incongruous, really—for the government to foist regulations on newspapers such as a five percent guideline for children's articles, a certain percentage for local news, or another minimum amount for news for minorities or the elderly. It's unclear why we are not sensitive enough to the First Amendment to view such restrictions on the electronic press as equally odd.

Thank you for providing me the opportunity to express my deep-rooted and strongly-held views on this matter. I wish you continued success in your efforts to remove the disparity between the electronic and print media.

Sincerely,

MARK S. FOWLER, *Chairman.*

STATEMENT OF DAVID J. MARKEY, ASSISTANT SECRETARY FOR COMMUNICATIONS AND INFORMATION, DEPARTMENT OF COMMERCE

Radio, television, and other electronic mass media currently are subject to statutory and other limitations governing program content.[1] The "Fairness Doctrine," said to be codified as part of section 315 of the Communications Act of 1934, as amended (47 U.S.C. Sec. 315 (1982)) requires broadcasters, for example, to cover controversial issues of public importance and to do so "fairly." [2] Under the "Equal Time Rule," codified in section 315, broadcasters must accord all candidates for public office equal air time should one candidate be granted media access, subject to a number of exceptions and conditions.[3] Section 312(a)(7) of the Act, added in conjunction with election reform legislation enacted by Congress in the 1970s, further obliges broadcasters to afford all candidates for Federal elective office on-air access and to do so at the "lowest unit rate." [4] These statutory requirements have been generally applied both to new media such as cable television as well as to the national television networks directly.[5]

In addition to the familiar Fairness, Equal Time, and Political Access requirements, broadcast licensees are also subject to additional program content regulations. Special requirements obtain, for example, with respect to "personal attacks."[6]

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[1] See generally Bazelon, *FCC Regulation of the Telecommunications Press,* 1975 Duke L.J. 213 (1975); Chamberlain, *Lessons in Regulating Information Flow: The FCC's Track Record in Interpreting the "Public Interest" Standard,* 60 N.C.L. Rev. 1057 (1982); Coyne, *The Future of Content Regulation in Broadcasting,* 69 Cal. L. Rev. 555 (1981); Robinson, *The FCC and the First Amendment: Observations on 40 years of Radio and Television Regulation,* 52 Minn. L. Rev. 67 (1967).

[2] See, e.g., *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 396 (1969); *CBS, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 116 (1973); *NBC* v. *FCC,* 516 F.2d 1101 (D.C. Cir. 1974); *Public Media Center* v. *FCC,* 587 F.2d 132 (D.C. Cir. 1978); *Fairness Doctrine Primer,* 48 FCC 2d 1, 15 (1974); *Editorializing by Broadcast Licenses,* 13 FCC 2d 1246 (1949). See generally Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment,* 52 N.C.L. Rev. 1, 2 (1973) (and citations therein); Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine;* 10 Harv. C.R. & C.L. L. Rev. 137 (1975).

[3] See, e.g., *Farmers Co-op* v. *WDAY,* 360 U.S. 525 (1959); *Flory* v. *FCC,* 528 F.2d 124 (1975).

[4] See, e.g., *CBS, Inc.* v. *FCC,* 453 U.S. 367, 375 (1981); *Kennedy Committee* v. *FCC,* 636 F.2d 432 (D.C. Cir 1980). See generally Deisley, *Recognition of Federal Candidates' Right of Access to Broadcasting Facilities,* 1982 Utah L. Rev. 641 (1982); Henwood, *The Affirmative Right of access for Federal Candidates,* 35 Ark. L. Rev. 637 (1982).

[5] See generally Geller & Lampert, *Cable, Content Regulation, and the First Amendment,* 32 Cath. U.L. Rev. 603 (1983); Krattenmaker & Metzger, *FCC Regulatory Authority over Commercial Television Networks,* 77 Nw. L. Rev. 403 (1982); Melnick, *Access to Cable Television: A Critique of the Affirmative Duty Theory of the First Amendment,* 70 Cal. L. Rev. 1393 (1982).

[6] See *Straus Communications, Inc.* v. *FCC,* 530 F.2d 1001, 1007 (D.C. Cir. 1976); *Personal Attack Rules,* 45 P. & F. Radio Reg. 2d 1635 (1959).

Broadcasting obscene, indecent, or profane programming is proscribed.[7] Noncommercial, educational broadcasters are circumscribed in their ability to editorialize,[8] and prohibited from airing most commercial advertising.[9] Under section 508 of the Communications Act, broadcasters may not air paid-for programming without also disclosing such payment or the actual sponsor,[10] may not air cigarette advertisements under provisions of title 15, U.S. Code,[11] and under section 509 of the Communications Act also may not air staged or otherwise misleading contests.[12] In addition to these statutory restrictions on program content, Federal Communications Commission rules and "policy statements" have the practical effect of proscribing a number of discrete categories of programming.[13] Television stations, for example, are constrained in the volume of network-supplied programs they may air during "prime time" hours, and also limited in the number of networks with which they may affiliate.[14] Finally, provisions of the Communications Act (47 U.S.C. Sec. 325 (1982)) as well as the copyright laws in general affect broadcasters in their program choices.

PROPOSED LEGISLATION

S. 1917, the "Freedom of Expression Act of 1983" evidently aims at repealing the most widely debated of the FCC's program content controls, namely those supported by sections 312 and 315 of the Communications Act. Section 4 of the bill would, first, repeal the "Political Access" requirements discussed above. Second, section 4(2) of S. 1917 would repeal section 315 of the Communications Act in its entirety, thus rescinding the Fairness and Equal Time rules. Finally, S. 1917 would amend the existing anti-censorship provision of the Communications Act (47 U.S.C. Sec. 326 (1982)) ostensibly to eliminate all regulatory authority to police or otherwise regulate program content.

NTIA'S VIEWS ON THE PRINCIPAL ISSUES

In our 1981 statement to the House Subcommittee on Telecommunications, Consumer Protection, and Finance concerning the need, if any, for special Federal constraints governing electronic media programming, we concluded that any case for the three most debated rules—Fairness, Equal Time, and Political Access—had been significantly eroded by technological and commercial changes in the U.S. mass media marketplace. We voiced strong support for the FCC's *Radio Deregulation* initiative, one aspect of which was the elimination of some of the regulatory program control "underbrush" with respect to AM and FM radio.[15] Similarly, we concluded that the public policy case for imposing traditional content controls on cable television systems was exceedingly weak and we noted again with approval, the FCC's Cable Television Deregulation ruling that, as with radio, curtailed some of the then-prevailing content controls.[16] We did not, however, specifically address controls imposed under statutory provisions other than sections 312 and 315 of the Communications Act.

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[7] See 18 U.S.C. Sec. 1462 (1982); *FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978).

[8] See 47 U.S.C.A. Sec. 399 (1983). See also *Community Service Broadcasters* v. *FCC,* 593 F.2d 1102 (D.C. Cir. 1978); *Muir* v. *Alabama Educ. Telev. Comm'n,* 688 F.2d 1033 (5th Cir. 1982); *League of Women Voters* v. *FCC* 547 F. Supp 379 (S.D. Cal. 1982), *cert. granted,* 52 USLW 3086 (1983). See generally Charkes, *Editorial Discretion of State Public Broadcasting Licensees,* 82 Colum. L. Rev. 1161 (1982).

[9] See 47 U.S.C.A. Sec. 399b(b) (Suppl 1983). Cf. *Metromedia, Inc.* v. *San Diego,* 453 U.S. 490 (1981); *Central Hudson Gas & Elec. Corp.* v. *New York PSC,* 447 U.S. 557 (1980); *ConEd* v. *NYPSC,* 447 U.S. 530 (1980).

[10] Cf. *United States* v. *Vega,* 447 F.2d 698 (2d Cir. 1971).

[11] See 15 U.S.C. Sec. 1335 (1982); *Larus & Brother Co.* v. *FCC,* 447 F.2d 876 (4th Cir. 1971); *Capital Broadcasting* v. *Mitchell,* 333 F. Supp. 582 (D.D.C. 1971).

[12] See *Melody Music, Inc.* v. *FCC,* 345 F.2d 730 (D.C. Cir. 1965).

[13] E.g., certain horse racing results (47 CFR 73.4135), obscene songs (47 CFR 73.4170), sirens and emergency sounds (47 CFR 73.4240), subliminal messages (47 CFR 73.4250), astrology (47 CFR 73.4030).

[14] See, e.g., *National Assoc. of Indep. Telev. Producers & Distributors* v. *FCC,* 502 F.2d 249, 516 F.2d 526 (2d Cir. 1974, 1975); *Access to Programs of More than One Network,* 28 FCC 2d 169, 31 FCC 2d 87 (1971).

[15] See *Radio Deregulation,* 84 FCC 2d 968 (1981), *aff'd and rev'd in part sub nom., Office of Communications of the United Church of Christ* v. *FCC,* — F. 2d. —, 53 P. & F. Radio Reg. 2d 1371 (D.C. Cir. 1983).

[16] See *Cable Television Deregulation,* 71 FCC 2d 632 (1979), *aff'd sub nom., Malrite TV* v. *FCC,* 652 F.2d 1140 (2d Cir. 1981).

Most traditional program content controls, of course, have been premised on "scarcity" notions or, more recently, assumptions regarding the unique persuasiveness or "immediacy" of the electronic media.[17] As we noted, however, the sheer number of radio stations now available to most of the public—10,137 nationwide at last count—and the plethora of viewing options currently offered the nation's 60 million cable television viewers largely negate any scarcity basis for regulating radio or cable programming, assuming, again, that such regulation is constitutionally permissible.

We did not not endorse proposals to lift program content limitations from television in 1981 because we were concerned that many of the analytical underpinnings present for cable and radio deregulation did not then exist for television. We indicated, however, our belief that the case for extending content deregulation to television would likely prove relatively easy to develop.

In response to the Senate Commerce Committee's subsequent request, NTIA staff undertook a careful review of the television broadcasting field. The results of this survey were forwarded to the Committee and have been made a part of the public record.[18] Our report focused chiefly on the "scarcity" rationale; we did not endeavor to address the more troublesome "impact" rationale sometimes advanced as justification for content controls. See, e.g., *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978); *Miami Herald Publ. Co.* v. *Tornillo*, 418 U.S. 241, 252 (1974).

Based on our earlier appraisal of prevailing conditions in the radio and cable television markets, and our more recent review of broadcast television, we believe repeal of sections 312(a)(7) and 315 of the Communications Act is warranted. The traditional scarcity rationale for these particular content control provisions, in our view, no longer obtains. We see no other sound and persuasive basis for imposing restrictions on commercial stations' editorial freedoms such as these twin, related provisions of the Communications Act impose.

CONCERNS WITH THE BREADTH OF S. 1917

We support the elimination of the Fairness, Equal Time, and Political Access rules that S. 1917 contemplates. Our review and, indeed, the extensive record that the Committee has developed to date, persuades us that these rules are no longer justifiable on the basis of assumed media scarcity. By discouraging coverage of controversial issues and legitimate political debate, these three rules, in our view, impose unacceptable opportunity costs and for no sound reason thus unreasonably constrain Mr. Justice Holmes' "free trade in ideas" (*Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). We believe a sound case exists for eliminating these contraints with respect to radio, cable television, broadcast television, and the other new electronic mass media now emerging.

We are concerned, however, that the broad language in the proposed revision of section 326 of the Communications Act could be construed as eliminating far more than merely those restrictions on editorial freedoms contained in sections 312 and 315 of the Act. As indicated above, currently there are a diversity of additional limitations placed on electronic media programs both by other provisions of the Communications Act and by other laws (whose terms are reflected in implementing FCC regulations).

Many of these additional constraints may be as unwarranted as those imposed under sections 312 and 315, given the changes in the marketplace that have occurred since their enactment. Our review of marketplace circumstances and the adverse consequences of FCC program controls has been limited, however, to the effects on radio, cable, and television of sections 312 and 315. We take no position on whether these other content controls can be sustained in view of the broad, proposed findings contained in S. 1917. This raises issues of constitutional law more appropriately considered by the Department of Justice.

CONCLUSION

We support the repeal of sections 312(a)(7) and 315 of the Communications Act, as S. 1917 proposes. Our analysis indicates no sound basis for the Fairness Doctrine,

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[17] See *CBS, Inc.* v. *Democratic Nat'l Committee, supra,* 412 U.S. at 116. See generally Jaffe, *The Editorial Responsiblity of the Broadcaster: Reflections on Fairness and Access,* 85 Harv. L. Rev. 768, 787 (1972); Note, *Content Regulation and the Dimensions of Free Expression,* 96 Harv. L. Rev. 1854 (1983).

[18] See NTIA Staff Report, *Print and Electronic Media: The Case for First Amendment Parity,* reprinted as S. Print 98-50 (May, 1983).

Equal Time, and Political Access rules. We now believe, moreover, that such repeal is warranted by the facts with respect to radio, cable, and broadcast television, based in part on the detailed and extensive report prepared last year at the Committee's request.

Although we thus believe there is a sound policy and factual basis for eliminating these three, most widely debated broadcast content controls, we are concerned about the breadth of the language contained in proposed new section 326. In enacted, this latter language in S. 1917 could have the effect of eliminating a diversity of programming rules that we have not yet fully studied.

We are reluctant, based on the facts now available to us, to endorse rescission of virtually all limitations on electronic media content, which this proposed language in the bill could be construed to accomplish. The elimination of all of these additional content controls may be desirable. Prior to reaching that determination, however, we would prefer more carefully to evaluate each constraint. The Fairness, Equal Time, and Political Access rules have been individually analyzed and evaluated in the context of industry conditions as they now exist. The same has not yet been accomplished with respect to other content-related rules, however, and until that has been done, we endorse only the repeal of sections 312(a)(7) and 315 called for in S. 1917.

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